CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 640.

HENRY L. HEERTZ, COLLECTOR OF INTERNAL REVENUE,

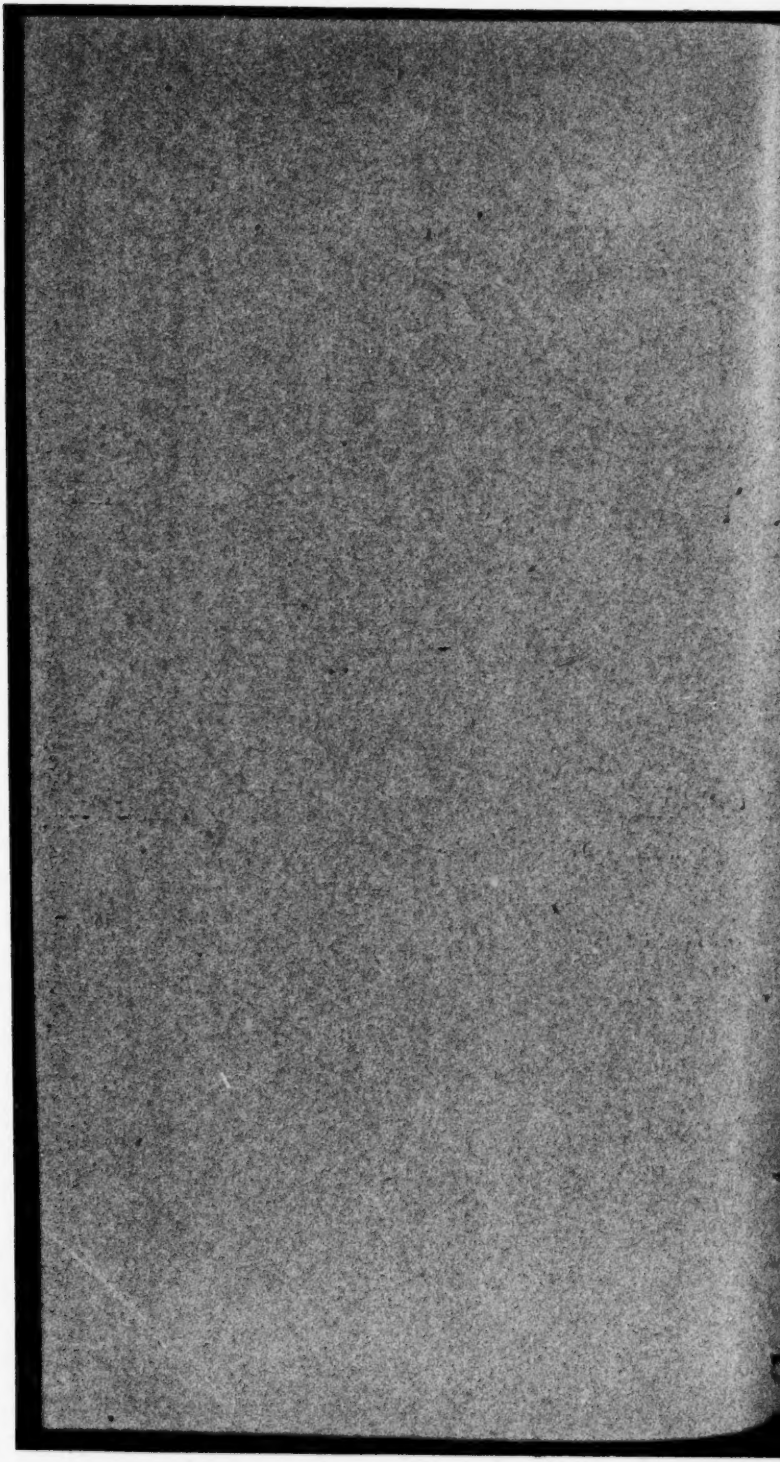
vs.

GORDON O. WOODMAN, JOHN WOODMAN, AND JOHN H. MUNSON, AS EXECUTORS OF THE ESTATE OF DAVID C. WOODMAN, DECEASED, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED OCTOBER 14, 1909.

(21866)



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INDEX.

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1 TUESDAY, *October 5, 1909.*

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge; Edward M. Holloway, clerk; Luman T. Hoy, marshal.

Before: Hon. Peter S. Grosscup, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE, plaintiff in error,
v.
GORDON O. WOODMAN, JOHN WOODMAN, AND JOHN H. Munson, as executors of the estate of Daniel C. Woodman, deceased, et al., defendants in error. } No. 1597.

Now this day come the parties by their counsel, Mr. Edwin W. Sims, United States district attorney, for the plaintiff in error, and Mr. Arthur W. Underwood and Mr. Nathan S. Smyser for the defendant in error, and this cause comes on to be heard and is submitted upon the printed record and briefs of counsel.

Thereupon, it is ordered by the court that certain questions of law be certified to the Supreme Court of the United States, which said certificate is in the words and figures following, to wit:

2 In the United States Circuit Court of Appeals for the Seventh Circuit, October term, A. D. 1908.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE, plaintiff in error,
v.
GORDON O. WOODMAN, JOHN WOODMAN, AND JOHN H. Munson, as executors of the estate of Daniel C. Woodman, deceased, et al., defendants in error. } No. 1597.

In this case, which has been submitted to this court upon briefs, a question of law arises concerning which the court desires the instruction and advice of the Supreme Court of the United States.

The defendants in error brought suit (at law) in the trial court to recover the amount paid to the plaintiff in error, as collector of internal revenue, as a tax demanded and collected by the said collector, under sections 29 and 30 of the act of June 13, 1898, popularly known as the War Revenue Act, as amended by the act of March 2, 1901 (2 U. S. Comp. Stat., pp. 2307 and 2308).

A declaration was filed in the lower court and a demurrer thereto filed by plaintiff in error. The demurrer was overruled and judg-

ment entered in favor of the defendants in error, whereof reversal is sought on writ of error.

The present inquiry involves only the following facts, which were set out in the declaration and admitted by the demurrer, viz:

(1) That James F. Woodman died testate, at Chicago,
3 Illinois, on the fifteenth day of March, 1902; that his will was admitted to probate on the third day of May, 1902, and letters testamentary issued to the Illinois Trust and Savings Bank as executor; that thereupon the said executor had in charge legacies of the clear value of $166,250, arising from personal property of the value of $190,554.05, payable, under the terms of said will, to the defendants in error.

(2) That on the seventeenth day of January, 1905, and before the payment and distribution to the legatees, the plaintiff in error, as collector of internal revenue for the First District of Illinois, demanded and collected of the said executors payment of $2,812.49 as and for the amount of the duty and tax claimed to be due and payable upon said legacies of the defendants in error, amounting to $166,250, under said sections 29 and 30 of the said act of Congress of June 13, 1898, as amended by the act of Congress of March 2, 1901.

Upon the foregoing facts the question of law concerning which this court desires the instruction and advice of the Supreme Court is this:

Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902 (U. S. Comp. Stat. Supp., 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901?

PETER S. GROSSCUP.
FRANCIS E. BAKER.
WM. H. SEAMAN.

4 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 3, inclusive, contain a true copy of the order entered on the fifth day of October, 1909, and the certain questions of law certified to the Supreme Court of the United States in the case of Henry L. Hertz, collector of internal revenue, v. Gordon O. Woodman, John Woodman, and John H. Munson, as executors of the estate of Daniel C. Woodman, deceased, et al., No. 1597, October term, 1909, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this sixth day of October, A. D. 1909.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

(Indorsement on cover:) File No. 21,866. U. S. Circuit Court Appeals, 7th Circuit. Term No. 640. Henry L. Hertz, Collector of Internal Revenue, vs. Gordon O. Woodman, John Woodman, and John H. Munson, as Executors of the estate of Daniel C. Woodman, deceased, et al. (Certificate.) Filed October 14th, 1909. File No. 21,866.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,
v.
GORDON O. WOODMAN ET AL., AS EXECUTORS OF THE ESTATE OF DAVID C. WOODMAN, DECEASED, ET AL., DEFENDANTS IN ERROR. } No. 640.

MOTION TO ADVANCE.

This case involves the question, upon which this court evenly divided in *Eidman* v. *Tilghman* (203 U.S., 580), viz: When a testator died within one year before July 1, 1902—the date when the act of April 12, 1902, repealing the war-revenue act of June 13, 1898, took effect (32 Stat., 97, 98)—and a legacy made by such testator's will vested in possession and enjoyment before July 1, 1902, was a tax "imposed" upon such legacy prior to the taking effect of the stated repealing act? If so imposed, the tax is expressly saved by section 9 of the repealing act. (32 Stat., 97, 98.)

The Circuit Court of Appeals for the Seventh Circuit has certified the following question to this court:

> Does the fact that the testator dies within one year immediately prior to the taking effect

of the repealing act of April 12, 1902 (U. S. Comp. Stat. Supp., 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901?

In the case of *Westhus* v. *Union Trust Company* (164 Fed. Rep., 795) the Circuit Court of Appeals for the Eighth Circuit held that the tax upon a legacy vesting in possession and enjoyment before July 1, 1902, was imposed before the latter date, and therefore was not affected by the repeal of the legacy-tax act on that date, though the testator died in December, 1901 (less than a year before the repeal of the legacy-tax act). The exact contrary was decided by the United States Circuit Court of Appeals for the Second Circuit (*Eidman* v. *Tilghman*, 136 Fed. Rep., 141), for the Third Circuit (*McCoach* v. *Philadelphia Trust Company*, 142 Fed. Rep., 120), for the Seventh Circuit (*United States* v. *Marion Trust Company*, 143 Fed. Rep., 301), and for the First Circuit (*Kinney* v. *Conant*, 166 Fed. Rep., 720). These several decisions, however, were not independently reasoned, but were put mainly upon the force of the decision in the Second Circuit as a precedent.

The result of the conflict now existing between the United States Circuit Courts of Appeals is that in the large portion of the United States embraced in the Eighth Circuit, citizens of the United States are compelled to pay an inheritance tax, though under identical circumstances citizens of the United States in other extensive portions of its territory

are not required to pay such tax. In other words, the rule of taxation, as it stands to-day upon judicial decision concerning the same statute, is different in different portions of the United States. Nothing could be more unjust; nothing could be more unfortunate; and it would seem that nothing could more urgently demand this court's attention and disposition. The existing situation, in which geographical uniformity of taxation is destroyed by judicial decision, is no better in a practicable view than if different tax rules had been explicitly prescribed by Congress for different parts of the United States; and indeed the existing situation is worse than if Congress had enacted the unequal taxation which now exists under judicial decisions, because uniformity can not be regained through pronouncement by the courts that the taxing act is unconstitutional.

While the pecuniary importance, both to the Government and to its citizens, of the question involved is little beside the injustice and impropriety of different taxation under identical circumstances in different parts of the United States, it is still highly material that millions of government revenue depend upon the merits of the present case. According to information received from the Treasury Department, a decision by this court of the question involved in this case and in *Eidman* v. *Tilghman* will affect over $1,100,000 of claims against the Government not barred by Revised Statutes, section 3228, and await-

ing the outcome of that question; $900,000 more for collection of which suits by the Government are pending; and also approximately $600,000 for which suits are pending against various collectors of internal revenue. The executive officials of the Government naturally hesitate to act concerning these large claims by and against the United States until this court settles the decisive question.

For the above reasons the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on a day during the present term.

Notice of this motion has been served upon counsel for the defendants in error in the lower court.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

HENRY L. HERTZ, COLLECTOR OF INTERNAL Revenue, plaintiff in error,
v.
GORDON O. WOODMAN, JOHN WOODMAN, and John H. Munson, as executors of the estate of David C. Woodman, deceased, et al. } No. 640.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MEMORANDUM CONCERNING FORM OF CERTIFICATE.

On the oral argument I called the court's attention to the following cases in which a certificate conforming to the exact statutory language no more closely than the certificate in the present case was treated by this court as sufficient; and I now merely print this memorandum of them for convenience.

In *Helwig* v. *United States* [Second Circuit] (188 U. S., 605) the certificate read:

> * * * and it appearing by the record that there is involved a question of the jurisdiction of the Circuit Court, it is ordered that

> the following statement of facts and the question arising thereon be certified to the Supreme Court for its instruction.

In *United States* v. *Montana Lumber & Mfg. Co.* [Ninth Circuit] (196 U. S., 573) the form of certificate was:

> Whereas this court is divided in opinion upon the questions of law so presented, and another case involving similar questions is pending before this court on writ of error to the District Court of the United States for the District of Montana, and a third case is pending before this court on writ of error to the Circuit Court of the United States for the Eastern District of Washington, and it is of public importance that said questions be speedily and finally determined:
>
> It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination—

In *United States* v. *Ju Toy* [Ninth Circuit] (198 U. S., 253), the certificate merely declared—

> Upon the foregoing statement the questions of law concerning which this court desires the instruction of the Supreme Court, are—

In *Nick Gurvich* v. *United States* [Ninth Circuit] (198 U. S., 581), the language of the certificate was:

> Upon the foregoing statement, the question of law concerning which this court desires the instruction of the Supreme Court is: Did or did not the District Court of the United States

for the District of Alaska, Division No. 1, err in compelling the plaintiff in error to go to trial before a jury composed of only six persons?

In accordance with the provisions of section 6 of the act of March 3, 1891, establishing Circuit Courts of Appeals, the foregoing question of law is by the Circuit Court of Appeals for the Ninth Circuit hereby certified to the Supreme Court of the United States for decision.

In *United States* v. *Pridgeon* [Sixth Circuit] (153 U. S., 48), it was said in the certificate:

> This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions arising upon the record and the doubt which the court have as to the correct decision thereof, that three questions arising on said appeal shall be certified to the Supreme Court for its instructions thereon, and that accompanying said questions there shall also be certified a statement from which such questions can be understood, which statement and questions are as follows, to wit—

In *United States* v. *Harsha* [Sixth Circuit], (172 U. S., 567) the formal parts of the certificate were:

> This cause coming on to be heard, was argued and submitted to the court, whereupon, the judges of the court being in grave doubt as to certain questions of law arising therein, it was ordered that the same be certified to the Supreme Court for its instruction

thereon with a proper statement of facts as follows, to wit—

* * * * *

The instruction of the Supreme Court is respectfully requested on certain questions of law arising on the foregoing statement of facts as follows, to wit.

And in *Moxley* v. *Hertz* (No. 398), on the docket of the present term, decided in January, 1910, the certificate was identical with that in the present case.

These instances have been gathered from an examination of the records in government cases only during a few recent years.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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No. 640.

57th CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. } REPORT No. 320.

REPEAL OF WAR-REVENUE TAXATION.

FEBRUARY 3, 1902.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. PAYNE, from the Committee on Ways and Means, submitted the following

REPORT.

[To accompany H. R. 10530.]

The object of this bill is to repeal all the various provisions of an act entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, and of the act amendatory thereto, approved March 2, 1901, which impose any taxes (except upon mixed flour). The original act was passed as a war-revenue measure at the beginning of our war with Spain and as a revenue measure producer it has proved a complete success. The revenue from internal taxes under the law has brought into the Treasury of the United States the following annual sums:

For the period from June 13 to July 1, 1898	$3,410,442.51
For the fiscal year ending June 30, 1899	102,359,618.36
For the fiscal year ending June 30, 1900	105,374,227.95
For the fiscal year ending June 30, 1901	107,646,213.05
From July 1, 1901, to December 31, 1901 (under act of March 2, 1901)	34,152,462.18
Making a total of	352,942,964.05

It was understood at the time of the passage of this act that it was purely a war measure, and that it would be repealed as soon as the war was over and the increased expense growing out of the war should cease.

In fulfillment of this understanding, by the act of March 2, 1901, Congress attempted to reduce this taxation in an amount equal to $40,000,000. How well it succeeded is shown by the tabulated statement appended, showing a reduction of $20,063,159.35 for the six months following the time when the act of March 2, 1901, took effect. If no reduction had been made by Congress, the natural increase, based upon the operations of the law for the previous three years, would indicate a revenue from the original act for the year ending June 30, 1902, of about $109,000,000. Deducting from this amount the $40,000,000

reduction, leaves an estimated revenue from the internal-revenue features of the original act of about $69,000,000. As we have already seen, the receipts under the amended law for the first six months of the present fiscal year amount to $34,152,462.18, indicating for the full year $68,304,924.36. It is reasonable, therefore, to expect a gross revenue from the law as it stands to-day of about $69,000,000 from its internal-revenue features for the present fiscal year.

Section 50 of the original law also imposes a duty of 10 cents per pound upon all tea imported. The revenue from this source has averaged about $8,000,000 annually. This year it will probably amount to $8,500,000. This bill repeals the duty on tea, the repeal to take effect January 1, 1903. We shall therefore receive the revenue from this duty for the first six months of the next fiscal year, and the reduction on this article will be only one-half of the annual revenue, or $4,250,000. Adding this to the internal-revenue reduction of $69,000,000, we have a total of relief from war taxes on account of this bill amounting to $73,250,000.

There were reasons which prompted the committee to postpone the repeal of section 50, imposing the duty upon tea, to January 1, 1903, which seemed to them well founded. In reducing the tax upon tobacco, it seemed necessary and just a year ago, as it does in this bill, to protect those who have stock on hand upon which the tax has been paid from a too sudden operation of the law. A rebate was paid upon the reduction of the tax a year ago, and this bill provides for the payment of a rebate upon the stock of unbroken packages which shall be found in the hands of dealers on the 1st of July, 1902.

Under regulations from the Treasury Department, the internal-revenue officers will inspect these stocks, and take an inventory of them, and will thus be able, as they were under the last reduction act, to prevent fraud against the Treasury. This internal-revenue force is spread over the country, and from their duties under revenue laws are necessarily familiar with the dealers and the stock on hand. The duties under the former act were carefully performed, and it is believed that no fraud upon the Treasury resulted from this rebate. It is equally important to the dealers of tea who have duty-paid stock on hand that the Government should make some suitable provision to place them on an equality with parties who have tea in bond which has not paid the duty and which can be withdrawn from bond when the law goes into effect and put upon the market.

But these duties are paid at the custom-house. The latter has no force of men in the interior of the country and there is no way in which the stocks of teas could be followed into the hands of the various retailers, to take an account of the stock of unbroken packages. The Government has no information as to where these teas are, they having been simply entered at the custom-house in large quantities by the importers. The committee therefore thought it was but just and equitable to postpone the effect of this repeal until the 1st of January next in order to give the holders of the present stock of tea an opportunity to dispose of it before the tea in the hands of the importers could be put upon the market free of duty. It is the duty of the Government in repealing a tax to make provision, as far as it is able, to prevent one class of citizens from making money at the expense of others in the like business.

It is a wonderful condition of our national finances which enables Congress to propose a reduction of $73,000,000 in the annual revenues. History furnishes no parallel to the situation. We had on the first day of the present month in the Treasury an available cash balance of $177,632,088.26, and this notwithstanding the fact the Treasury has paid out of this available surplus during the present fiscal year in the purchase of bonds for the sinking fund the sum of $61,196,444.56.

The Secretary of the Treasury in his annual report estimated the surplus of revenue over expenditures for the present fiscal year at $100,000,000. Subsequent events have confirmed this estimate as conservative and reasonable. With this surplus for the year, it would seem that notwithstanding this reduction of $73,000,000 we will still have a surplus of $27,000,000 for the next fiscal year.

The surplus for the present year has largely resulted in a decrease of war expenditures. The present indications are that our troops will soon be withdrawn from Cuba and that we are liable to require a much smaller force in the Philippine Islands during the coming fiscal year. This would result in a still further decrease of war expenses. The Secretary is still purchasing bonds for the sinking fund, and it is anticipated that he will be able to use the greater part of the surplus accruing during the remainder of the fiscal year in this manner. This would result in keeping within its present limit the available cash balance in the Treasury.

It is true there are some unusual claims to be met. The refund of internal revenue taxes would approximate $5,000,000. The refund of duties collected on goods from the Philippine Islands, something over a million and a half, and a small refund for duties collected before the enactment of the House bill placing a tariff on articles coming from Porto Rico. But these and other similar claims can easily be taken care of by the surplus which will accumulate before the end of the present fiscal year.

A surplus is a more healthy condition of affairs than a deficit, and no harm results from it so long as there are outstanding bonds to be paid. There is no valid reason why we should continue to accumulate it, however. None of our outstanding bonds are now due. We can only purchase them in the open market. Our credit is so astonishingly good and our bonds in consequence bring so large a premium that it is difficult to purchase them in the market. Sound business judgment dictates a sweeping reduction of our revenues.

One of the best features of the war-revenue act was the provision for loans on certificates of indebtedness to the amount of $100,000,000, to run at the discretion of the Secretary of the Treasury for a period not to exceed one year from the date of issue. Here we have, for the first time in our legislation, provision against any temporary embarrassment of our Treasury, should the time ever arise when there is a deficit in the revenues.

It can not be denied that a large surplus furnishes temptation for extravagant expenditure. While Congress may generally be relied upon to keep the national expenses within reasonable bounds, it should be relieved from the pressure which comes with plausible schemes from every quarter to raid an overflowing Treasury. Every consideration of prudence commends the wisdom of the measure which we now present.

The committee recommend that the bill do pass with the following amendments:

Page 3, line 21, strike out the word "not."

Page 6, line 7, after "die" insert "before this act shall take effect."

Page 6, line 7, strike out "as aforesaid."

Page 6, line 25, strike out "or shall accrue thereon."

Page 10, after line 9, insert a new section, as follows:

SEC. 8. That section thirty-five of said act of June thirteenth, eighteen hundred and ninety-eight, and the amendments thereof, be amended so as to read as follows:

"SEC. 35. That for the purposes of this act, the words 'mixed flour' shall be taken and construed to mean the food product resulting from the grinding or mixing together of wheat, or wheat flour, as the principal constituent in quantity, with any other grain, or the product of any other grain, or other material, except such material, and not the product of any grain, as is commonly used for baking purposes: *Provided*, That when the product resulting from the grinding or mixing together of wheat or wheat flour with any other grain, or the product of any other grain, of which wheat or wheat flour is not the principal constituent as specified in the foregoing definition, is intended for sale, or is sold, or offered for sale as wheat flour, such product shall be held to be mixed flour within the meaning of this act."

Page 10, line 10, strike out "8" and insert "9."

Page 10, line 13, strike out "9" and insert "10."

Statement showing receipts from war-revenue acts only, from June 13, 1898, to June 30, 1901; also the first six months of the act of March 2, 1901, from July 1 to December 31, 1901.

	Receipts from June 13 to July 1, 1898.	Receipts during the fiscal year 1899.	Receipts during the fiscal year 1900.	Receipts during the fiscal year 1901.
Schedule A	$724,073.94	$38,618,081.20	$36,416,082.11	$34,998,836.30
Shedule B	70,343.66	5,219,737.46	4,548,283.19	4,242,200.02
Beer	2,023,747.66	31,093,138.38	33,431,221.65	34,439,516.10
Special taxes	46,973.00	5,370 941.80	4,844,743.97	4,463,629.00
Tobacco	367,639.64	14,225,994.63	16,738,622.13	17,646,102.88
Snuff	18,361.03	875,898.72	895,045.07	1,001,510.66
Cigars	110,268.16	2,717,851.34	3,189,764.14	3,462,560.62
Cigarettes	39,090.29	1,402,828.18	1,320,394.72	1,139,079.63
Legacies		1,235,435.25	2,884,491.55	5,211,898.68
Excise tax		643,446.41	1,079,405.14	1,027,294.99
Mixed flour		7,840.62	7,439.46	6,606.36
Additional taxes on tobacco and beer	9,945.13	947,424.37	18,734.82	6,977.81
Total	3,410,442.51	102,359,618.36	105,374,227.95	107,646,213.05

	(Act June 13, 1898.) Total.	Receipts from July 1, 1900, to Dec. 31, 1901. (Act Mar. 2, 1901.)	Gross total from both acts.
Schedule A	$110,757,073.55	$6,925,145.27	$117,682,218.82
Schedule B	14,080,564.33	324,527.59	14,405,091.92
Beer	100,987,623.79	14,343,317.40	115,330,941.19
Special taxes	14,726,287.77	4,226,229.41	18,952,517.18
Tobacco	48,979,359.28	4,908,734.71	53,888,093.99
Snuff	2,790,815.48	268,879.95	3,059,695.43
Cigars	9,480,444.26	344.99	9,480,789.25
Cigarettes	3,901,392.82	16,269.04	3,917,661.86
Legacies	9,331,825.48	2,634,963.74	11,966,789.22
Excise tax	2,750,146.54	493,682.42	3,243,828.96
Mixed flour	21,886.44	1,585.55	23,471.99
Additional taxes on tobacco and beer	983,082.13	8,782.11	991,864.24
Total	318,790,501.87	34,152,462.18	352,942,964.05

Comparative statement showing receipts from war-revenue acts only, from July 1 to December 31, 1900 and 1901.

	1900. July 1 to December 31. (Act June 13, 1898.)	1901. July 1 to December 31. (Act March 2, 1901.)	Increase.	Decrease.
Schedule A	$16,257,449.36	$6,925,145.27		$9,332,304.09
Schedule B	2,145,911.58	324,527.59		1,821,383.99
Beer	18,628,371.72	14,343,317.40		4,285,054.32
Special taxes	3,703,796.00	4,226,229.41	$522,433.41	
Tobacco	8,288,701.74	4,908,734.71		3,379,967.03
Snuff	421,169.25	268,879.95		152,289.30
Cigars	1,754,122.70	344.99		1,753,777.71
Cigarettes	638,407.18	16,269.04		622,138.14
Legacies	1,863,638.59	2,634,963.74	771,325.15	
Excise tax	507,531.84	493,682.42		13,849.42
Mixed flour	4,473.50	1,585.55		2,887.95
Additional taxes on tobacco and beer	2,048.07	8,782.11	6,734.04	
Total	54,215,621.53	34,152,462.18		20,063,159.35

VIEWS OF THE MINORITY.

The minority members of the Ways and Means Committee submit their views on the bill (H. R. 10530) to repeal war-revenue taxation, and for other purposes, as follows:

The bill, as reported by the committee to the House, repeals substantially all that is remaining on the statute books of the act entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898. That act was passed to raise the money necessary for the prosecution of the late war with Spain. When the act was passed it was declared that it was a measure temporary in its object and nature, but it has been kept in force, to the injury of the business interests of the country, long after the war ended. The only excuse for not repealing it entirely long ago, and thereby giving relief to the country, has been that the expenditures growing out of that war, by reason of the unwisdom and extravagance of the dominant party, have been so enormously large that they were unwilling to cut down or reduce the war taxes. The tremendous sums which were being collected were considered necessary by that party to meet their abnormally excessive expenditures.

At this late date the undersigned felt that as members of the Ways and Means Committee, they should join the majority in recommending the repeal of these taxes. They did not do this, however, until they had made ineffectual efforts to have some of these taxes, for the first time placed on accumulated wealth, retained, and not repealed by this act. If the bill becomes a law as reported by the committee it will reduce taxation about $77,000,000. Although we voted for the bill as a whole, we endeavored to amend it, as stated, by leaving unrepealed some of the taxes in the war measure, which, we felt, were not burdensome on the people. For instance, among others we thought that the tax on the gross receipts of petroleum and sugar refiners should remain; and while leaving these unrepealed, we sought to add a provision repealing all customs duties on trust-made goods, etc.

While approving in general the policy of repealing the war taxes we insisted, and shall insist, that certain taxes upon accumulated wealth, provided for in that act, should be allowed to remain. We refer, as already indicated, to such taxes as are imposed on sugar and petroleum refiners. The tax of one-fourth of 1 per cent on the annual gross receipts of sugar and petroleum refiners in excess of $250,000 yields the sum of about $1,000,000 annually. This tax has been paid without demur or protest, and there is no reason why the great combinations engaged in these refineries, and which monopolize the business in these cases, and from which colossal individual fortunes have been built up should not pay some part of the national expenses as well as the masses of the people who use and consume the various things which are the subject of customs and internal revenue taxation.

As the Supreme Court has denied to Congress the right to tax incomes for the support of the Government, it is well to place accu-

mulated wealth under some form of contribution, and we know of none more just or equitable than a tax such as that imposed as the war-revenue act on oil and sugar refiners. It is true that they are taxed while other forms of corporate and industrial wealth go free, but this can be remedied by reducing the rate of the tax and by extending it to all industrial corporations whose gross receipts exceed a fixed sum. In connection with this tax annual statements should be required which will give the data as to the capitalization, indebtedness, gross receipts, operating expenses, taxes (national and state), dividends, number of plants, output, foreign and domestic sales of such corporations, etc., thus giving the Governmen' the statistical information necessary in legislation affecting the customs duties, internal-revenue taxation, and regulation of trusts.

Such statements could be classified and published by the Commissioner of Internal Revenue, as are the railroad statements by the Interstate Commission and the bank statements by the Comptroller of the Currency. Publicity will thus be secured as to the transactions of these great industrial combinations, which put forth the claim that they should be protected by a tariff imposing a prohibitory tax on foreign goods similar to those of their own manufacture, whilst they monopolize our local markets, and impose charges in the home market greater than those made of the same goods in foreign markets. Surely every consideration of justice requires that industries securing by legislation so great protection from the Government, and improperly, too, as we think, should at least contribute something in the way of internal revenue to the Government, and that the transaction which receives so high a legislative protection should be made public, in order that the country may the better judge as to the justice of their claim for protection.

It can not be contended that the demand for such statements is an unreasonable intrusion into the private affairs of such corporation. If they claim protective legislation, the public is entitled to the facts in their operations, so as to determine whether or not such protection shall be accorded to them. They comprise a very large proportion of the wealth of the country, and Congress has the right to demand sufficient information and knowledge of their affairs as to be able to form a correct judgment as to whether or not they are justly taxed. These corporations are exercising and enjoying monopolies in nearly all kinds of business, and the public have a right to the information which will enable Congress to determine whether or not their operations are prejudicial to the public good, and whether or not regulative or prohibitory legislation is required.

When it was first proposed to compel banks to make such statements there was an outcry by bankers, who claimed that the legislation was an intrusion upon private business. So also with the railroads; and yet both banking and railroading have been developed in their scientific operation by the system of classified statements which have been required by law. By compelling the industrial corporations to come under the same regulations we would obtain a mass of statistical information which would enable us to deal justly and fairly upon the subjects involved. Publicity itself would cure many evils, and as to such evils as were not cured by publicity the proper legislation could be applied. Our legislation could then be controlled by exact informa-

tion and knowledge, and not by imagination and ignorance, and would not be based upon guesswork, as is too often the case.

Being unable to change or modify the bill by amendment before it was reported, we will insist on amending it in the particulars mentioned, and others also, when it is before the House. It must be apparent that without any injury to the public service a far greater reduction in taxation can be made than that proposed in the pending measure. The Treasury statement of February 1 shows a cash balance on hand of $324,796,646.

During the last session of Congress an act was passed repealing a portion of the war taxes, amounting to about $40,000,000. As a party we insisted then there could be taken off a much greater sum, and that the reduction then made should not be less than $70,000,000. This measure of relief was refused by the then dominant party, and to-day they are making a similar refusal. Considering the extraordinarily large balance in the Treasury, we maintain that there should be a much larger reduction in taxation than is contemplated in the pending bill; that this reduction, instead of being $77,000,000, should be at least $125,000,000. Such a reduction could be so made, and the rates of custom duties could be so adjusted as to give a wonderful impetus to trade and commerce. We believe, too, that this act should take effect at once, and its relief not be postponed, as provided, until July 1 next.

The minority members of the committee are of the opinion that, with the Treasury overflowing, it is a most auspicious time for a readjustment and revision of our tariff laws. The present law is unjust and unequal in its operation, and its burdens are not fairly and equitably distributed. It has been properly denominated the mother of trusts. It has permitted monopolies to be built up under it, such as were never known in our history. It has prohibited trade and narrowed our markets in many places where our people should be permitted to offer their goods, wares, and merchandise at remunerative prices. It permits trusts and combines to be born and to grow to such enormous proportions as to defy the power of the Government itself, and under its favorable operations they are daily extorting from our home people far greater prices in our home markets for the necessaries of life and for agricultural implements and commodities, etc., which they sell them than the prices at which they voluntarily sell the like articles and commodities to foreigners in foreign markets.

This shocking evil should be at once remedied. It would be too mild a characterization of this practice to call it anything else but plain robbery. It should be remedied even if there were not a surplus dollar in the Treasury, and that immediately, but when the Treasury is overflowing with money taxed out of the people and the industries of the country there is no possible excuse for not reforming the tax laws, reducing the burdens on the country, and extending our opportunities for trade where to-day no trade exists. The modification of the present tariff law, if properly made, would remedy this gross wrong to our people. The modification can be made in such manner as to benefit and enlarge our opportunities for trade and commerce. It is no answer to this contention to say that our commerce is now large. It should be much greater and more remunerative.

The Dingley tariff law stands as a Chinese wall against the extension of our trade. If a proper revision of the tariff should be made, more

liberal trade arrangements with all foreign countries would be speedily made, markets for everything we grow or manufacture would instantly appear, and a genuine era of prosperity would set in, such as has never been known in our history.

In voting for the pending measure, even if it be not amended as we think it should be, we do not mean to be understood as approving it in every detail, and we assert that we intend to put forth the most strenuous efforts for a reduction of the rates of customs duties and a substantial revision and reformation of our present onerous tax laws.

JAMES D. RICHARDSON,
S. M. ROBERTSON,
CLAUDE A. SWANSON,
GEO. B. MCCLELLAN,
FRANCIS G. NEWLANDS,
S. B. COOPER.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

HENRY L. HERTZ, COLLECTOR OF INTERNAL REVENUE, Plaintiff in error,
v.
GORDON O. WOODMAN, JOHN WOODMAN, and John H. Munson, as executors of the estate of David C. Woodman, deceased, et al. } No. 640.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The certificate in this case presents the following single question:

> Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902 (U. S. Comp. Stat. Supp., 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901? (Rec., 2.)

James F. Woodman, the testator, died on March 15, 1902. His will was admitted to probate on May 3,

1902, and letters testamentary were issued to the Illinois Trust and Savings Bank as executor. Thereupon the executor "had in charge legacies of the clear value of $166,250, arising from personal property of the value of $190,554.05, payable, under the terms of said will, to the defendants in error." (Rec., 2.) On January 17, 1905, before distribution of these legacies, plaintiff in error, as collector, demanded and collected $2,812.49 as the proper inheritance tax on the succession to the stated legacies; and the suit was brought to recover the tax so paid. (Rec., 2.)

The answer to the certified question will depend upon the following statutes:

1. Section 29 of the act of June 13, 1898, reading:

> That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: * * * (30 Stat., 464; chap. 448).

The succeeding provisions of the section relate only to the amount of tax, and are unimportant in the case.

2. Section 30 of the act of June 13, 1898, as amended by section 11 of the act of March 2, 1901, which reads:

> That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be duly paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by

his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule,

list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States in the name of the United States against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by

the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government: *And provided further*, That in case of willful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dol-

lars, to be recovered with costs of suit. Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged. (31 Stat., 948, chap. 806.)

3. Sections 7, 8, and 11 of the act of April 12, 1902, which read:

SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed.

SEC. 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: * * *

SEC. 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two. (32 Stat., pt. 1, pp. 97, 98, 99; chap. 500.)

The succeeding portion of said section 8, not here repeated, merely reiterates section 30 of the act of June 13, 1898, as amended March 2, 1901.

4. Section 3 of the act of June 27, 1902, reads:

> SEC. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two. (32 Stat., 406; chap. 1160.)

For a number of years the question here at issue has been the subject of much litigation. It first

arose in the Second Circuit, and the Court of Appeals for that circuit held that under circumstances like those of the present case the tax had not been "imposed by section 29" before July 1, 1902, when the repealing act took effect, and that consequently the tax was not saved against the repeal by the above-quoted words of section 8 of the repealing act of April 12, 1902. That case was brought to this court by certiorari, and the judgment of the Court of Appeals was affirmed by a divided court. (*Eidman* v. *Tilghman*, 136 Fed., 141; 203 U. S., 580.) A like decision was made in the Third Circuit, but solely on the authority of *Eidman* v. *Tilghman* (*Philadelphia Trust Company* v. *McCoach* and *Norris* v. *McCoach*, 135 Fed., 866); and this case also was brought here by certiorari and the judgment was affirmed by a divided court (205 U. S., 539). The authority of *Eidman* v. *Tilghman* was followed also, without independent consideration, by the First Circuit in the cases of *Gill* v. *Austin* (157 Fed., 234), and *Kinney* v. *Conant* (166 Fed., 720). The Circuit Court of Appeals for the Eighth Circuit, however, found itself unable to subordinate its own opinion to a desire for uniform decision, and in *Westhus* v. *Union Trust Co.* (164 Fed., 795) held to the contrary of *Eidman* v. *Tilghman*. The question remains undecided in the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits.

As a result of the depicted situation in the Courts of Appeals, it can not be said that there is anything in their decisions which makes for one or another

answer to the certified question; and both the conflict of authority in the Courts of Appeals and the large pecuniary importance of the issue urgently call for a settlement of the controversy by this court.

ARGUMENT.

I shall make the following contentions:

First.—Whatever may later be found to be the exact and positive test whether a tax was "imposed by section 29" of the act of June 13, 1898, before July 1, 1902, when the repealing act took effect, the fact that the testator or intestate decedent from whom the inheritance passes died within one year before July 1, 1902, is certainly not the test.

Second.—Ascertainment of the true test is merely a problem of finding just what Congress intended; and, in view of the language employed in the saving clause of the repealing act itself, the history of the changes which the repealing act underwent in Congress, and the explicit provisions of the act of June 27, 1902, it is unmistakable that Congress intended by the saving clause of the repealing act to preserve the tax whenever the legacy or distributive share had vested in possession and enjoyment before July 1, 1902, and everything had therefore happened before that date which section 29 of the act of June 13, 1898, declared sufficient to make the executors, administrators, or trustees having the estate in charge "subject to a duty or tax."

Third.—It is even true that when a legacy or distributive share vested in possession and enjoyment

before July 1, 1902, a technical and full obligation to the United States for the tax at once arose, notwithstanding the allowance by the statute of a further, uncertain period within which the persons having the estate in charge might make their schedule of the tax and pay it.

Fourth.—If either of the two immediately preceding propositions is correct, it is immaterial whether or not a tax lien was created before July 1, 1902; but, beyond that, if the third proposition is correct, a lien was created as soon as the legacy or distributive share vested in possession and enjoyment.

Fifth.—The rule of construction that fair doubt in a taxing statute should be resolved in favor of the citizen has no application to this case; because (1) no fair doubt exists, and (2) the question is not whether the taxing statute covers the case but whether the repealing act has given relief from the taxing statute, and (3) when a legacy or distributive share vested in possession and enjoyment before July 1, 1902, the full benefit of the succession absolutely and at once accrued to the legatee or next of kin and there can be no equity in relieving from the tax on the mere test of the time for returning and paying the tax, with the result of destroying the tax in one case and retaining it in another case, though equally in both cases the full benefit of the succession accrued before the repealing act took effect.

FIRST.

Whatever may later be found to be the exact and positive test whether a tax was "imposed by section 29" of the act of June 13, 1898, before July 1, 1902, when the repealing act took effect, the fact that the testator or intestate decedent from whom the inheritance passes died within one year before July 1, 1902, is certainly not the test.

I.

The exact language of the saving clause of the repealing act is here important; and in the second proposition it will be found decisive. The language is not that taxes "imposed by the act of June 13, 1898," shall be saved; but that taxes "imposed *by section 29* of the act of June 13, 1898, and amendments thereof," shall be saved. The saving clause in terms makes satisfaction of section 29 the *specific* test of what taxes shall be preserved.

The reference to amendments of section 29 is immaterial in every aspect of the case, because section 29 was never amended save in the single provision added by the act of March 2, 1901, to the effect that the act should "not be held to apply to any estate where the testator or intestate died before June 13, 1898," when the original act was passed. (31 Stat., 946, 947.)

Section 29 alone dealt with the subject of what should be taxable; and it dealt with that subject only. It contained no provisions concerning return or payment of the tax or lien for the tax or relating in any way to enforcement of the tax. On the other hand, section 30 alone dealt with the time for return-

ing and paying the tax and the creation of a lien for the tax and the enforcement in different ways of the tax called for by section 29. At the outset, therefore, it is apparent that the reference of the saving clause to section 29, and to that section only, as the part of the law under which the question whether a tax was imposed before July 1, 1902, should be determined seems to declare the provisions of section 30, covering the various methods of enforcing the tax, to be irrelevant to the question.

The clause for payment in one year after the testator's death is in section 30—not in section 29; and that clause only came into section 30 by the amendment of March 2, 1901. Not only, therefore, does the saving clause, by its express reference to section 29 as determining whether a tax had been imposed, exclude consideration of the one-year clause, with the other provisions of section 30 relating to enforcement of the tax; but, beyond that, it would certainly be strange if our question had been made by the saving clause to depend upon a provision first introduced into the general scheme by the amendment of 1901.

II.

The absolute irrelevancy of the one-year clause, however, is demonstrated by the fact that that clause applies only to testamentary estates. It says that the tax "shall be due and payable in one year after the death of the testator." It therefore has no application to an intestate estate. Can it be that a distributive share vesting in possession and enjoyment

before July 1, 1902, is within the saving clause, and the tax thereon is consequently preserved though the intestate died between July 1, 1901, and July 1, 1902—as is indisputable—and that nevertheless a legacy vesting in possession and enjoyment before July 1, 1902, is not within the saving clause because the testator died between July 1, 1901, and July 1, 1902? An interpretation of the saving clause which leads to such incongruity in the treatment of testamentary and intestate estates must be utterly inadmissible.

Feeling the fundamental difficulty of the point just made, those who contend that death after July 1, 1901, forbids application of the saving clause have urged at different times that the limitation of the one-year clause to the case of a legacy from a "testator" was an inadvertence; and that therefore the clause should be construed as reaching to both testamentary and intestate estates. This claim, however, is inadmissible, as three things will show:

1. Whether inadvertent or not, the legislative limitation of the clause by express words to the case of a testamentary estate can not be changed by a court. How can judges expand the word "testator" into the phrase "testator or intestate?" Uncertain terms may be judicially interpreted; but unmistakable words can not be judicially altered; or, rather, words not in a statute at all can not be judicially inserted.

2. The limitation of the clause to the case of a testamentary estate was not an inadvertence. The amend-

ments of section 30 by the act of 1901 cover many details, and they resulted from a careful scrutiny of the section as originally passed. No man can say, after studying the alterations, that the changes were made without minute consideration.

3. Further, there was a reason for requiring payment always within one year in the case of a testamentary estate, which does not apply to the case of an intestate estate. Delay of the final adjustment is more common and more serious with the former than with the latter kind of estates. Intestate estates are distributed under relatively simple and direct rules of law. Testamentary estates involve all the complications of trusts, vested and contingent expectancies, and the various arrangements which the testator's prudence or fancy may put into his will. There was occasion, therefore, for the requirement of payment of the inheritance tax within one year from the testator's death, as to legacies; and there was no equal reason for like requirement as to distributive shares. The one-year clause was therefore anything but inadvertent.

I return to the inquiry, Can the death of a testator between July 1, 1901, and July 1, 1902, be decisive against preservation of the tax on a legacy, though it vested in possession and enjoyment before July 1, 1902, and yet be of no moment as to preservation of the tax on a distributive share, if it vested in possession and enjoyment before July 1, 1902?

III.

While more can hardly be necessary to show that the one-year clause does not afford the test whether a tax was "imposed by section 29" before July 1, 1902, it will nevertheless clarify other aspects of the general subject to show that the time for payment of even the tax on a legacy is often not governed by the one-year clause.

Consider first the plain case of a legacy which does not vest in possession and enjoyment until after one year from the testator's death. Under *Vanderbilt* v. *Eidman* (196 U. S., 480) the tax does not attach until the legacy vests in possession and enjoyment, and therefore it is of course not yet payable. What, then, does govern the time for payment of the tax on such a legacy? The other clause of section 30, retained notwithstanding the insertion of the one-year clause, that "every executor, administrator, or trustee, *before* payment and distribution to the legatees or any parties entitled to beneficial interest therein," shall make payment. Obviously this is the only clause that can govern the time for payment in the supposedcase; and the one-year provision drops out again, just as it does always concerning intestate estates.

IV.

Consider next the statutory rule concerning the time for paying the tax on a legacy which, beside vesting in possession and enjoyment within one year after the testator's death, is actually given over to the legatee within that year. Which rule governs the time for paying that tax—the one-year

provision or the requirement of payment "before payment and distribution to the legatee?" Plainly, the tax then is payable at once upon the distribution to the legatee, because that occurs before the one year expires; and as to legacies vesting in possession and enjoyment within a year after the testator's death, it must be the earlier of the two things—distribution to the legatee or expiration of the year from the testator's death—which makes the tax payable. Otherwise, the two coexisting clauses of section 30 which require payment within one year from the testator's death and also require it before distribution to the legatee become inconsistent. Otherwise, too, the introduction of the one-year clause by the amendment of 1901 works a result foreign to its real purpose. We have seen that the reason for introducing that clause was to guard against undue delay in the payment of the tax in consequence of the frequently great delay in the settlement of testamentary estates, because of their very nature. The one-year clause therefore must have been intended to expedite the time of payment instead of deferring it.

It results, from the many things just advanced, that the clause introduced by the amendment of 1901 for requirement of the payment of the tax on succession to a legacy within one year after the testator's death has absolutely nothing to do with the question whether or when a tax had been "imposed by section 29" within the saving clause of the repealing act.

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SECOND.

Ascertainment of the true test is merely a problem of finding just what Congress intended; and, in view of the language employed in the saving clause of the repealing act itself, the history of the changes which the repealing act underwent in Congress, and the explicit provisions of the act of June 27, 1902, it is unmistakable that Congress intended by the saving clause of the repealing act to preserve the tax whenever the legacy or distributive share had vested in possession and enjoyment before July 1, 1902, and everything had therefore happened before that date which section 29 of the act of June 13, 1898, declared sufficient to make the executors, administrators, or trustees having the estate in charge "subject to a duty or tax."

I.

Argument is, of course, unnecessary to show that the problem of ascertaining in what cases the saving clause preserved the tax is merely to ascertain the actual intent of Congress in that regard. Congress had power to save the tax in any case, so long as it established a general rule, operating upon all alike and not capriciously; for Congress could have retained the taxing statute altogether, without repealing any part of it. For concrete example, Congress could have said in terms that the tax should be preserved whenever a legacy or distributive share had vested in possession and enjoyment before July 1, 1902, when the repealing act took effect. The question is, Did Congress actually intend exactly that? If such was the intention of Congress, our question is answered, entirely without reference to, and inde-

pendently of, any inquiry whether a full technical obligation to the United States for the tax arose as soon as the legacy or distributive share vested in possession and enjoyment and also independently of any question when a lien for the tax sprang up.

Reserving for my third proposition the point that a technical and full obligation for the tax did arise in favor of the United States as soon as a legacy or distributive share vested in possession and enjoyment, I shall now seek to show that—even if such later contention be rejected—it was the palpable intent of Congress to save from the operation of the repealing act all cases where a legacy or distributive share had vested in possession and enjoyment before July 1, 1902. In other words, it was the purpose of Congress to preserve the right to assess and collect a tax on the succession to a legacy or distributive share whenever the right of succession had already vested beneficially in the legatee or next of kin before the repealing act took effect.

II.

It was intrinsically natural and probable, because of the very nature of the tax with which Congress was dealing, that Congress should adopt the rule for which I contend. What was the thing taxed by the the act of 1898? The *transmission* of a legacy or distributive share; *i. e.*, the actual accrual to the legatee or next of kin of a present beneficial right in the legacy or distributive share. So this court settled in *Knowlton* v. *Moore* (178 U. S., 41) and

Vanderbilt v. *Eidman* (196 U. S., 480). Why, then, should not the tax be preserved, notwithstanding the repealing act which took effect July 1, 1902, when the event or transaction that was taxed had already happened before July 1, 1902? Any other rule, beside disregarding the very nature of the tax, would inevitably lead to impropriety and unjust discrimination. Consider specifically how the saving clause would operate if it did not save the tax upon a legacy vesting in possession and enjoyment before July 1, 1902, because that tax had not then become payable. Nobody questions that the tax was saved in every case where it had become payable before July 1, 1902. The result is that, though the subject of the tax was the same in both cases, viz, the transmission or vesting of a beneficial right in the legacy or distributive share, and though that event had occurred both in the case where the tax was payable before July 1, 1902, and in the case where the tax was not payable before that date, yet the tax would be preserved in the former case and destroyed in the latter case. Is there either propriety or justice in taxing one person and not taxing another person upon the same thing, which has happened in both cases at the same time, merely because the time limit for payment of the tax varied in the two cases?

Here also it is most important to notice that the time of payment of the tax is always within the control of the administrators (at least with the concurrence of the next of kin) in the case of a distributive share, and is within the control of the

executors (at least with the concurrence of the legatees) in the case of a legacy whenever the legacy vests in possession and enjoyment more than one year after the testator's death. Those things are true because always in the case of distributive shares, and also in the case of the described legacies, the return and payment of the tax by the executors or administrators are only required to be "before payment and distribution to the legatees." The administrators or the executors, at least with the approval of the next of kin or the legatees, could defer actual delivery of the distributive share or legacy as long as they please; and consequently they could postpone the time of required return and payment of the tax until after July 1, 1902, whenever they might choose so to do, notwithstanding the vesting of the distributive share or legacy in possession and enjoyment before July 1, 1902. Is it possible that Congress can be held to have intended that the test of operation of the saving clause should lie in the time for the required return of the tax or required payment of the tax, when that time rested within the choice of the persons having the estate in charge and the beneficiaries of the estate? Did Congress leave the question of tax or no tax to the will of the taxpayers?

III.

The exact language of the saving clause, which preserved "all taxes or duties *imposed by section 29*" of the war revenue act, will now be seen to have pro-

found significance. The words "by section 29" free the saving clause from dependence upon any question of the time when a return for the tax is required from the persons having the estate in charge, or upon any question whether the tax had become payable before July 1, 1902, or upon any question whether or when a lien had attached. All those subordinate matters are governed by section 30; and section 29 neither treats them nor operates by reason of them. Section 29 does its own work, by reason solely of the vesting of a legacy or distributive share in possession and enjoyment. (*Vanderbilt* v. *Eidman*, 196 U. S., 480.) *It is the actual operation of section 29 before July 1, 1902, in consequence of the vesting of a legacy or distributive share in possession and enjoyment before that date, which the saving clause expressly makes the test of the tax being preserved against the general repeal.* There is no occasion for entering into refinements as to what the exact operation or result of section 29 is, when a legacy or distributive share has vested in possession; it is enough that it does *something* upon the happening of that event, for the saving clause makes the attainment of the result of section 29—and nothing else—enough to preserve the tax.

The saving clause, by its express recognition of section 29 *alone* as the part of the law which "imposes" the tax, shows that what Congress meant to save was the tax on all legacies and distributive shares as to which section 29 had operated, in one or another way, by reason of the vesting of the legacy

or distributive share in possession and enjoyment before July 1, 1902. It makes no difference what was the exact nature or extent of the operation of section 29 upon the vesting of the legacy or distributive share in possession and enjoyment. *Whatever it was, the saving clause by express terms made it enough.*

Viewing the matter on its reverse side, the language of the saving clause positively *forbids* testing the question whether a tax had been "imposed" before July 1, 1902, by application of any of the rules of section 30, concerning return for the tax or payment of the tax or lien in support of the tax or proceedings of one or another kind for collection of the tax. The saving clause treats the provisions of section 30 as having nothing to do with the question whether a tax had been imposed before July 1, 1902. It refers for solution of that question to section 29 only and makes the solution of that question depend upon section 29 alone.

The reasons, too, why Congress should have made the vesting of a legacy or distributive share in possession and enjoyment and the consequent operation of section 29 the sole and sufficient basis for application of the saving clause have been made apparent. Otherwise, one would have to pay the tax and another would not have to pay it, though the thing taxed, viz, the vesting of the legacy or distributive share in possession and enjoyment, occurred in both cases before July 1, 1902, and though the time when the schedule or return for the tax would have to be

made and the time when the tax would have to be paid could both be postponed indefinitely by the choice of the interested parties—always in the case of distributive shares and often in the case of legacies.

IV.

The history of the changes in respect of the saving clause which the repealing act underwent in Congress also makes it clear that Congress intended to save the tax whenever a legacy or distributive share had vested in possession and enjoyment before July 1, 1902.

The phraseology of the bill which resulted in the repealing act of April 12, 1902, was, when that bill originally passed the House of Representatives, as follows:

> That the tax or duty imposed by section 29 of the act of June thirteenth, eighteen hundred and ninety-eight, above referred to, shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of *every person who may die before this act shall take effect* for twenty years, etc. (Cong. Rec., 57th Cong., 1st sess., March 21, 1902, pp. 3113, 3114; Id., Feb. 17, pp. 1836, 1837.)

This shows that the purpose of the House was to save the tax whenever the testator or intestate died before the repealing act took effect, July 1, 1902. What happened afterwards, instead of showing that either the Senate or the House altogether abandoned this plan and substituted an entirely new purpose of

cutting away the tax if the testator or the intestate died after July 1, 1901, shows, rather, that the language underlined in the above quotation was eliminated only because that language ran counter to the existing statute and (beyond merely preserving the operation of that statute) would enlarge its operation, certainly in the first and possibly in the second of these two important respects, viz:

1. The language eliminated would have imposed and preserved a tax upon all legacies and distributive shares if the testator or intestate died before July 1, 1902, even though the legacy or distributive share did not vest in possession and enjoyment before July 1, 1902. Such a result would have importantly widened the reach of the taxing statute beyond its prior requirement that, as held in *Vanderbilt* v. *Eidman*, a legacy or distributive share must vest in possession and enjoyment before a tax could attach.

2. Further, there had been serious controversy before the amendment of section 29 in 1901, whether the tax attached where the legacy passed in possession and enjoyment from the testator or intestate after June 13, 1898, when the original statute was enacted, though the testator died before June 13, 1898; and the language underlined in the above quotation and eliminated in the act of 1902, as finally adopted, would have raised a serious question whether a tax would not attach though the testator or intestate had died before June 13, 1898. The Treasury Department had ruled at the outset that no

tax would attach when the testator died before the original act of June 13, 1898, was passed (Treasury Decision 19561 of June 23, 1898, and Treasury Decision 20437 of December 15, 1898); but later it ruled that a tax applied if the legacy passed after June 13, 1898, though the testator died before that date (Treasury Decision 20988 of April 11, 1899). It was to close that controversy that the proviso of March 2, 1901, was added to the original section 29, and stated expressly that no tax should be had when the testator or intestate died before June 13, 1898. The language of the measure of 1902, as the bill was first passed by the House, would have reopened that controversy; for the words "every person who may die before this act shall take effect" (July 1, 1902) were wide enough to cover a death before June 13, 1898, though the legacy passed afterwards.

Beyond meeting these two difficulties, just stated, there was no purpose on the part of Congress to change the reach of the saving provision of the repealing act from its original scope. Three things establish that view:

1. The final language of the saving clause, which in terms preserved all taxes "imposed by section 29"—without reference to the rules of section 30—just met the difficulties above stated. It left the operation of section 29 exactly what it had been since the amendment of 1901, both in the way of not taxing any legacy or distributive share unless it vested in possession and enjoyment before the repealing act took effect,

July 1, 1902, and also in the way of not taxing any estate passing even before July 1, 1902, from a testator or intestate who died before June 13, 1898.

2. After the Senate had adopted many amendments to the measure of 1902 as it passed the House, the House refused to concur in any of the Senate amendments (35 Cong. Rec., pt. 4, p. 3202); whereupon a conference was had (Id., pp. 3202 and 3189). The conference agreed that the Senate should recede from its amendments numbered 12 and 19 and that the House should concur in the Senate's other amendments (Id., pp. 3759 and 3805). The House conferees expressly reported to the House that the changes made by the Senate, except in the rejected amendments 12 and 19, were not "substantial." This report used the following language on the point in hand:

> No. 12 was the only substantial amendment made by the Senate, which sought to retain the tax on so-called bucket shops. And the House has receded from its disagreement to the amendments of the Senate which changed the phraseology of the bill, *but made no material change in its provisions.* (35th Cong. Rec., pt. 4, p. 3805.)

The amendment now under consideration was No. 6 (35th Cong. Rec., pt. 3, p. 3113), and was therefore one of those referred to in the report of the House conferees as changed in phraseology but not in substance.

The only possible view under this conference report and the action of the House in acceding to

the report is that there was certainly no intention to narrow the operation of the saving clause—at any rate further than was necessary to avoid an enlargement of the scope of the original taxing statute in the two respects above indicated.

3. Finally, it must be noticed that this repealing act of 1902 repeated section 30, as amended in 1901, saying "that all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof, prior to the taking effect of this act, shall be subject, *as to lien, charge, collection, and otherwise,* to the provisions of section 30 of said act of June 13, 1898, and amendments thereof, which are hereby continued in force, as follows." (Sec. 8 of the act of Apr. 12, 1902; 32 Stat., 97.) The act of 1902 thus retained and reiterated the clause that the tax on succession to a legacy should be "due and payable in one year after the death of the testator;" but retention and reiteration of that clause were absurd, because entirely useless, if it was the intention to repeal the tax in every case where the testator died after July 1, 1901. In every case where the testator died before July 1, 1901, a year would already have elapsed before the repealing act took effect, and consequently that one-year clause (though reiterated in the repealing act itself) could have no possible operation unless the saving clause were to preserve the tax on some legacies from testators who died after July 1, 1901. Here is another clear indication that the provision for payment within one year has nothing to do with the operation of the saving clause.

V.

If doubt could otherwise exist, the act of June 27, 1902, must remove it. That act reads:

> That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two. (Sec. 3 of the act; 32 Stat., pt. 1, chap. 1160, p. 406.)

This act in terms makes the vesting of a legacy in possession and enjoyment before July 1, 1902, the test, in the first place, whether a tax should thereafter

"be assessed or imposed," and also, in the second place, whether the Secretary of the Treasury should refund the tax, if it had been actually paid. Nothing but the vesting in possession and enjoyment before July 1, 1902, is made the test in either case. The rules of section 30 concerning return and payment and collection of the tax receive no attention and are given no effect.

This act of June 27, 1902, was passed less than three months after the passage of the repealing act of April 12, 1902, and *only four days before that repealing act was to take effect.* Congress must have had in mind, when passing the act of June 27, the same criterion for determining whether a tax should be deemed to have accrued before July 1, 1902, as was in the Congressional thought when the repealing act itself was passed.

Nor can it be said that, while the act of June 27 forbids collection of a tax upon a legacy vesting in possession and enjoyment after July 1, 1902, it does not recognize that a tax may be collected if the legacy vests in possession and enjoyment before that date. There is a clear implication that when the legacy vests in possession and enjoyment before July 1, 1902, the tax may be had. Further, the refunding provision is most forcible. It does not authorize a refund when the legacy vested in possession and enjoyment before July 1, 1902; though the Secretary of the Treasury of course would have no authority to make the refund (at any rate, when

the payment had been voluntary) without statutory authority. If it had been intended then that the tax paid on legacies vesting in possession and enjoyment before July 1, 1902, should not be retained, a provision for refund by the Secretary of the Treasury would have been necessary.

A construction of the saving clause of the repealing act which makes its operation depend upon anything else than the vesting of a legacy or distributive share in possession and enjoyment before July 1, 1902, brings the repealing act of April 12 and the quoted act of June 27 into direct and unavoidable conflict. They become flatly inconsistent. Such a construction can not be allowable. For instance, suppose that a legacy vested in possession and enjoyment before July 1, 1902, but the time for returning and paying the tax on it was after July 1, 1902 (either because of the one-year clause or because of the clause requiring return and payment before delivery of the legacy to the legatee); then under the act of June 27 the tax should be collected, but under the act of April 12 (if any other test than vesting in possession and enjoyment be adopted under the saving clause) the tax would be destroyed. Can the two statutes, passed so nearly together, have been fundamentally inconsistent?

Finally, while the act of June 27 relates only to contingent legacies, it can not be that the operation of the saving clause in the repealing act depends upon one test as to contingent legacies but upon a

different test as to absolute legacies and distributive shares. Certainly the saving clause means the same thing all the time; and must have established the same criterion for all cases.

VI.

No difficulty arises from the use of the word "imposed" in the saving clause. Whatever may be the general meaning of that word, the saving clause itself defines it for present purposes by addition of the words "by section 29." Those words show that "imposed," for the purposes of the saving clause, means merely the satisfaction of section 29 through the happening of the things which were sufficient to make section 29 applicable to the case. It is unimportant, in view of the precise language of the saving clause, whether upon the vesting of a legacy or distributive share in possession and enjoyment the succession at once was completely taxed or not; it is enough, under the language of the saving clause, that the succession then became at any rate taxable. The actual attainment of the result for which section 29 called, when its own conditions were satisfied, was made by the saving clause sufficient to preserve the Government's right.

The word "imposed" is used repeatedly in the taxing act of 1898, in the repealing act of 1902, and in the act of June 27, 1902, in a wide sense, as signifying that the law calls for a tax. Examples of this use are—

Section 1 of the act of 1898 provides that there shall

be paid "in lieu of the tax of one dollar now imposed by law" a tax, etc., on malt liquors.

Section 2 provides that "special taxes shall be, and hereby are, imposed annually as follows."

Section 3 provides that "there shall, in lieu of the tax now imposed by law, be levied and collected a tax," etc.

Section 4 provides that "special taxes on tobacco dealers and manufacturers shall be and hereby are imposed."

Section 9 refers to "any and all cases where an adhesive stamp shall be used for denoting any tax imposed by this act."

Section 17 refers to exemptions from the taxes "required by" and "imposed by" the act.

Section 18 requires the affixing of an adhesive stamp "denoting the tax imposed by this act."

Section 20 prescribes a penalty for the sale of drugs "upon which a tax is imposed by this act" without first affixing proper stamps.

And the repealing act of 1902 repeatedly uses the word "imposed" in a like sense. Thus:

Section 1 amends section 1 of the act of 1898 changing slightly the above-quoted language of that section, making it read "in lieu of the taxes now imposed by law."

Section 3 amending section 3 of the old act retains the language "in lieu of the taxes now imposed by law."

Section 4 provides for a drawback of certain taxes paid in excess of those "imposed by this act."

Likewise, the act of June 27, 1902, concerning contingent legacies, provides that "no tax shall hereafter be assessed or imposed," etc., unless the legacy vests in possession prior to July 1, 1902.

This court itself, in *Vanderbilt* v. *Eidman*, spoke of section 29 as "imposing" a tax. It said:

> And coming to consider section 30, relating to the collection of the duty or tax *imposed* by section 29, the meaning of section 29, as just indicated, is made clearer (p. 494).

Such meaning of section 29, declared in the stated case, was that a tax was imposed by that section when the legacy vested in possession and enjoyment.

VII.

The decisions in *Clapp* v. *Mason* (94 U. S., 589) and *Mason* v. *Sargent* (104 U. S., 689) in no way conflict with the position now taken for the Government.

Each of these cases was an action to recover a tax which had been paid upon the succession to real estate or personalty devised or bequeathed to Mason under the will of William P. Mason in remainder after a life interest in the testator's widow. William P. Mason, the testator, died December 4, 1867; his widow died, and her life interest terminated, June 17, 1872; and the interest of the litigant Mason in both the land and personalty therefore did not vest in possession until June 17, 1872. The tax was claimed by the Government under the act of 1864; and section 125 of that act, as amended by the act of July 13, 1866,

provided that the tax should "be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom," etc. This statement is made from the quotation of the act found in the opinion of this court on page 690 in 104 U. S. The act of July 14, 1870, had repealed the act of 1864 as to taxation on successions after the 1st day of August, 1870. (16 Stat., 261, sec. 17.) The repealing act declared:

> And all acts and parts of acts relating to the taxes herein repealed, and [that] all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof; and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such act is hereby saved. (Page 590 in 94 U. S.)

The question in the two cases, therefore, was whether there was a tax "the right to which had already accrued" before the general repeal, August 1, 1870; and it was held that no tax had accrued before that date.

Three things distinguish the stated decisions from the present case:

1. Neither the devise nor the legacy had vested in possession and enjoyment before the date of the repeal, August 1, 1870. The succession in possession and enjoyment did not occur until the widow died, June 17, 1872. There was, therefore, no taxable succession before the repeal operated; and the very test urged by the Government in the present case, viz, vesting in possession and enjoyment before the repeal, required a decision against the Government in the *Mason* cases.

2. As appears from the above quotation, the statute of 1864 as amended in 1866 made the tax "due and payable" as soon as the devisee or legatee became "entitled to the possession or enjoyment" of the devise or legacy "or to the beneficial interest in the profits accruing therefrom." Under this statute, therefore, the time when a taxable succession occurred and the time when the tax became payable were the same. There was no interval between the two times, as under both the act of 1898 and its amendment in 1901. There was, therefore, in the cited cases no room for saying either that a taxable succession could occur or that the succession could fall under an obligation for the tax before the time for returning and paying the tax. This fact not only differentiates the cases from the one at bar, but also explains the language used in parts of the opinion to the effect that there could be no tax until it was assessed and demandable.

3. The repealing act of 1870 as above quoted saved only taxes which had "accrued," and that language was radically different from the saving clause of the act of 1902, which in terms preserves all taxes "imposed by section 29." It could well be said that a tax had not accrued until a full obligation for the tax had arisen; but, as already argued in detail, the saving clause in 1902 preserved the right to a tax whenever section 29 alone had been satisfied before July 1, 1902, whether or not a full obligation for the tax had then arisen.

It appears, therefore, from the foregoing distinctions, that the *Mason* cases are entirely consistent with the views now advanced; and, further, that both the taxing act, in respect of time of assessment and payment, and the repealing act, in respect of its saving provision, were utterly different in the *Mason* cases from the taxing act of 1898 and the saving clause of 1902.

THIRD.

It is even true that when a legacy or distributive share vested in possession and enjoyment before July 1, 1902, a technical and full obligation to the United States for the tax at once arose, notwithstanding the allowance by the statute of a further, uncertain period within which the persons having the estate in charge might make their schedule of the tax and pay it.

I.

The language of section 29 is now important. It says:

> That any person or persons having in charge or trust, as administrators, executors, or

> trustees, any legacies or distributive shares * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory * * * shall be, *and hereby are, made subject to a duty or tax*, to be paid to the United States, as follows (30 Stat., 464):

This subjection of the persons having the estate in charge to a tax as soon as the legacy or distributive share "passes" from the testator or intestate, *i. e.*, under *Vanderbilt* v. *Eidman*, as soon as the legacy or distributive share vests in possession and enjoyment, is an immediate creation of a present obligation for the tax. Other things than the statutory words indicate the same result. The right of the United States to have a tax *some day* assessed and paid became absolute with the vesting of the legacy or distributive share in possession and enjoyment; no contingency therefore could affect the existence of that right. Only the particular time for scheduling and paying the tax remained subject to any contingency. The thing on and for which the tax was to be laid under the statute had happened as soon as a legacy or distributive share vested in possession and enjoyment. Why then should not an obligation for the tax at once spring up?

When land is "subject to" a mortgage, there is an existing charge. When section 29 said that the passing of the legacy or distributive share in possession and enjoyment should make the executors or

administrators "subject to" a tax, it in like manner created a charge against them. This is of course entirely compatible with the statutory allowance of a further period for liquidation and payment of the tax; and, indeed, the uncertain duration of that further period corroborates the idea that the creation of an obligation for the tax was not postponed. As already shown, the time limit for scheduling and paying the tax is, in every case of a distributive share and in every case of a legacy vesting in possession and enjoyment later than one year after the testator's death, within the independent choice and control of the executors or administrators and the legatees or next of kin themselves. Can it be that the obligation does not arise until the time limit for scheduling and payment is reached, by the choice of the very parties who are to pay the tax?

The duty *some day* to schedule and pay was laid certainly and completely on the executors or administrators as soon as the legacy or distributive share vested in possession and enjoyment. The existence of that duty, beyond further contingency, is enough to show that an obligation for the tax had arisen.

II.

The language of the saving clause of the repealing act and the explicit provisions of the act of June 27, 1902, show that an obligation arose as soon as the legacy or distributive share vested in possession and enjoyment.

It is sufficient for the purposes of the case, as already argued, that at any rate the language of those two acts manifested an intent on the part of Congress to save the tax wherever a legacy or distributive share had vested in possession and enjoyment before July 1, 1902; but the significance of the statutory language goes still further. If section 29, as the repealing act says, "imposed" a tax, did not that section create an obligation? And if, as the act of June 27, 1902, says, the single fact of vesting in possession and enjoyment fixed the right to a tax, did not that same event create a tax obligation?

The opinion in *Vanderbilt* v. *Eidman* has already been quoted to the effect that section 29—not the provisions of section 30 "relating to the collection" of what section 29 requires—"imposes" the tax (p. 494). Was it not meant that section 29 created an obligation for the tax at once upon the vesting of the legacy or distributive share in possession and enjoyment?

III.

The scheduling of the legacy or share was merely for the purpose of liquidating, or giving precision to, the tax. It fixed the amount of the tax; but it was not necessary in order to create a liability.

Analogies may be found in the great variety of debts or claims existing in unliquidated amount, which are made precise and definite by some subsequent act or occurrence. Another illuminating anal-

ogy exists in the case of a railroad land grant, which is made *in præsenti*, but acquires precision only upon the filing of the railroad's map of definite location.

The claim that the obligation could not exist before arrival of the time for its payment is most unnatural. Payment, instead of relating to the creation of an obligation, effects its destruction. Payment discharges a previously existing obligation.

IV.

Let it be admitted, if necessary, that the Government could not sue for the tax in advance of "assessment" by the executor or administrator (who by the statute are themselves required to assess it) or by the collector of internal revenue (who may assess it if the executors or administrators do not). But a concession that assessment is a condition precedent to suit by the Government does not involve that it is a prerequisite to the existence of an obligation for the tax. A liability often exists before it is mature and enforceable.

The reasons why suit might be held not to lie before assessment are that it does not belong to the courts, but to the proper executive officers, to determine in the first instance the definite amount of the tax; and the taxpayer ought to have the exact amount of his obligation defined before he can be put in default for failure to pay. Those reasons, however, entirely fail to show that the right to a tax could not exist before assessment.

Taxing statutes of the States frequently illustrate the existence of a tax obligation before assessment of its amount. Thus, even a tax lien often exists before assessment.

> Hurd's Revised Statutes of Illinois, 1905, chapter 120, paragraphs 347; 306, 310; 346, 177.
>
> Massachusetts Laws, 1909, chapter 490, part 2, section 36; part 1, sections 15, 23, and 50; part 2, section 2.
>
> Bates's Annotated Ohio Statutes, 5th ed., sections 2838; 2736 and 2753; 1091.

Also, a tax obligation often rests upon a vendor of real estate who sells it in advance of assessment.

> Hurd's Revised Statutes of Illinois, 1905, chapter 120, paragraph 302.
>
> Kentucky Laws, 1908, chapter 47, section 2.

And an express instance of an inheritance tax, charged upon the estate and even declared to be payable in advance of assessment, exists in Kentucky.

> Kentucky Laws, 1906, chapter 22, Article XIX, sec. 4.

V.

Especially, the duty of assessing and paying the tax was not laid upon the executors and administrators by the acts of 1898 and 1901 *at the time of* delivery of the legacy or distributive share to the legatee or next of kin, but "before" that delivery. How long before? The duty obviously antedated the delivery of the legacy or share, *and therefore it existed independently of such delivery.* The time of distribu-

tion to the legatees or next of kin merely fixed the *limit* of time for assessment and payment. It fixed the time of *default* in assessment or payment. What then was the true and only source of the duty of the executors or administrators to make assessment and payment? It could have been only the vesting of the legacy or distributive share in possession and enjoyment. No other event after that and "before" delivery of the legacy or share to its beneficiary can possibly have fixed the duty.

FOURTH.

If either of the two immediately preceding propositions is correct, it is immaterial whether or not a tax lien was created before July 1, 1902; but, beyond that, if the third proposition is correct, a lien was created as soon as the legacy or distributive share vested in possession and enjoyment.

I.

No discussion is necessary to show that the question of the existence of a lien is entirely irrelevant if the second proposition, *supra*, is sound; because, if the saving clause operates whenever a legacy or distributive share vested in possession and enjoyment before July 1, 1902, and whenever in that way section 29 was satisfied before July 1, 1902, then nothing else is important.

II.

Likewise, if the third proposition, *supra*, is correct, viz, that an obligation for the tax came into existence as soon as the legacy or distributive share

vested in possession—though that obligation awaited measurement of its amount and payment at a later and uncertain time—then again the question whether a lien sprang up simultaneously with the obligation is immaterial. If a tax had been imposed before July 1, 1902, because even a full obligation for the tax had then come into being in consequence of the vesting of the legacy or distributive share in possession and enjoyment, it can make no difference whether or not that obligation was aided by a lien. The lien would help its enforcement, but not its existence.

Nor is it possible to argue that no lien arose upon the vesting of the legacy or share in possession and enjoyment, and that the absence of a lien at that time (while not fatal to the existence of an obligation) evidences that no obligation then arose. The statute is wholly indefinite as to when a lien springs. It says only "that the tax or duty aforesaid * * * shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States" (sec. 30; 31 Stat., 948). This does not indicate when a lien begins; it may have been upon the death of the testator or intestate, or upon the vesting of the legacy or share in possession and enjoyment, just as easily as later. A rational view of the statute therefore requires that the lien be deemed to have arisen whenever an obligation arose; and it is quite topsy-

turvy to argue the reverse, that no obligation arose because no lien had arisen. The obligation is the principal thing, and should govern its incident, the lien. The proper view of the statute, therefore, is that a lien, aiding the obligation, came into existence with the obligation, when the legacy or distributive share vested in possession and enjoyment.

FIFTH.

The rule of construction that fair doubt in a taxing statute should be resolved in favor of the citizen has no application to this case; because (1) no fair doubt exists, and (2) the question is not whether the taxing statute covers the case but whether the repealing act has given relief from the taxing statute, and (3) when a legacy or distributive share vested in possession and enjoyment before July 1, 1902, the full benefit of the succession absolutely and at once accrued to the legatee or next of kin, and there can be no equity in relieving from the tax on the mere test of the time for returning and paying the tax, with the result of destroying the tax in one case and retaining it in another case, though equally in both cases the full benefit of the succession accrued before the repealing act took effect.

I.

Not merely ambiguity of language, but a reasonable uncertainty concerning the intent of Congress, must exist before this rule of construction can be given any operation. In the case at bar no fair ambiguity can be found in the language of the statutes; and surely no fair uncertainty can exist concerning the intent of Congress in the saving clause.

II.

Nobody questions that the case at bar is within the operation of the taxing act of 1898, unless the repeal of 1902 took it out. Such question as exists relates to the scope of the repealing act, not to the scope of the taxing act. The rule concerning the effect of a fair doubt upon the right of the State to a tax concerns only the question of an intention to tax (*Eidman* v. *Martinez*, 184 U. S., 578, 583). Such intention being established, all other intendments are against the taxpayer. Thus, although "words of *exception* confining the operation of duty" are to be construed liberally, the rule concerning exemptions is just the contrary (*Eidman* v. *Martinez*, *supra; Sturges* v. *Carter*, 114 U. S., 511, 521). And a proviso in a revenue law is to be strictly construed (*Cliff* v. *United States*, 195 U. S., 159, 163).

Defendants in error come into court with a claim that the repealing act of 1902 operated to prevent a tax which was plainly demanded by the taxing act of 1898. Claiming thus that the taxing act had been displaced as to them, defendants in error are in much the same position as persons who claim the benefit of an exemption. Certainly there is no strong analogy between the case of a statute levying and the case of a statute relieving from a tax. In the former case the statute subjects the citizen to a burden; but in the latter case the statute takes off the burden. Should not those who claim the benefit of the relieving statute show their right to the relief with as much clearness as is required of the Government in imposing

a burden? The situation is reversed; and the rule of construction ought to be. At any rate, there is no propriety in requiring of the Government the same strictness in showing that the repealing act has not displaced the taxing act in a given case as would be required of the Government in showing that the taxing act itself was wide enough to embrace that case.

III.

How does the matter stand in respect of fundamental equity? When a legacy or distributive share has vested in possession and enjoyment a full beneficial succession has occurred. People generally, who came into such a beneficial succession after the passage of the taxing act in 1898 and before the operation of the repealing act, on July 1, 1902, were subjected by the Government to a charge because of the beneficial succession which had come to them. Ought the repealing act, with its saving clause, to be construed with any solicitude for particular persons who seek to avoid a tax, solely by reason of incidental matters not in any way affecting the benefit which they received through a present and complete succession before the repealing act took effect?

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

O

AUTHORITIES AND CITATIONS.

The acts and parts of acts to be considered in this proceeding are printed as an appendix to this brief at pages 59 to 62 herein.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 640.

HENRY L. HERTZ, Collector of Internal Revenue,
Plaintiff in Error

v.

GORDON O. WOODMAN, JOHN WOODMAN and JOHN H. MUNSON, as Executors of the Estate of David C. Woodman, Deceased, et al, Defendants in Error.

On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANTS IN ERROR.

THE QUESTION CERTIFIED.

The Circuit Court of Appeals for the Seventh Circuit has certified to this Court the following question:

"Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing Act of April 12, 1902 (U. S. Comp. Stat. Supp., 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the Act of June 13, 1898, as amended by the Act of March 2, 1901?"

It is respectfully submitted that under the circumstances stated there was no right to collect the tax, that the foregoing question was improperly certified and that, if answered at all, it should be answered in the affirmative. Argument in support of these suggestions has been arranged under the following headings and subheadings.

OUTLINE OF ARGUMENT.

I. The Question Was Improperly Certified and Should not be Answered.

A. Because the Circuit Court of Appeals does not require "instruction * * * for the proper decision" (*Columbus Watch Company* v. *Robbins*, 148 *U. S.* 266, 269) of the question. *Discussed on pages* 5–7.

B. Because the trial court was bound by the judgments of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Stephenson* (*decided on May* 20, 1908, *not reported; certiorari refused, October* 19, 1908, 212 *U. S.* 572) and *United States* v. *Marion Trust Company* (143 *Fed.* 301; *affirmed*, 203 *U. S.* 594)

and as it committed no error in following those cases, its judgment should have been affirmed. *Discussed on pages* 7–8.

C. Because the Circuit Court of Appeals for the Seventh Circuit had decided this question in *United States* v. *Stephenson, supra*, and *United States* v. *Marion Trust Company, supra*, and was bound to apply the rule *stare decisis* to this case. *Discussed on pages* 8–11.

D. Because the affirmance of the judgments in *Eidman* v. *Tilghman* (136 *Fed.* 141; 203 *U. S.* 580), *Philadelphia, Trust, Safe Deposit & Insurance Company* v. *McCoach* (142 *Fed.* 120; 203 *U. S.* 539); *Norris* v. *McCoach* (142 *Fed.* 120; 203 *U. S.* 539); and *United States* v. *Marion Trust Company, supra*, by the Supreme Court, though by an equally divided Court, settled the principle of law so as to bind every tribunal inferior to the Supreme Court. *Discussed on pages* 11–19.

II. The Interpretation of the Act of June 13, 1898, Should Now Be Regarded as Settled.

A. Because in no less than seven cases, with the express sanction of the Supreme Court, citizens similarly situated in every respect, have been finally relieved from the payment of the tax. *Discussed on pages* 19–20.

B. Because a contrary conclusion would make the tax operate unequally and create gross injustice. *Discussed on pages* 20–22.

III. It Is Clear That Congress Intended to Prevent the Collection of Any Legacy Tax Which Did Not Become Due and Payable Prior to July 1, 1902.

A. Because the calculations and statements contained in the report of the Committee on Ways and Means of the House of Representatives show that revenue from this source was expected to stop on the date of the repeal. *Discussed on pages* 22–28.

B. Because the "saving clause" in the repealing act does not disclose any purpose to continue this tax. *Discussed on pages* 28–42.

C. Because the period of one year between the death of the testator and the date on which the statute made the tax "due and payable" coincides with the period ordinarily allowed for presenting and proving claims against the estate, and until that period has elapsed and the net value of the estate has been ascertained the interests of legatees and distributees are "contingent beneficial interests" which cannot "become absolutely vested in possession or enjoyment," within the meaning of the refunding and declaratory Act of June 27, 1902. *Discussed on pages* 42–45.

D. Because the terms necessary to express a different intent are well understood and Congress would have used them if it had purposed to continue the tax, and every doubt or ambiguity in the Act of June 13, 1898, and the amendatory acts must be construed in favor of the citizen. *Discussed on pages* 45–48.

I–A. The Question was Improperly Certified and Should not be Answered Because the Circuit Court of Appeals Does Not Require "Instruction * * * for the Proper Decision" (*Columbus Watch Company* v. *Robbins*, 148 *U. S.* 266, 269), of the Question.

It is impossible to overlook the extraordinary and peculiar circumstances under which this question arises at this time in this Court. The precise question has twice been argued before this tribunal (*Eidman* v. *Tilghman*, *supra*, and *Philadelphia Trust Company* v. *McCoach*, *supra*) and four times this Court has affirmed judgments which depended upon its affirmative decision (*Eidman* v. *Tilghman*, *supra*, *Philadelphia Trust Company v. McCoach*, two cases—*supra*, and *Norris* v. *McCoach*, *supra*). In a fifth case, *United States* v. *Marion Trust Company* (143 *Fed.* 301; 203 *U. S.* 594), a judgment was affirmed which, although involving the estate of an intestate, cannot be reconciled with any theory of interpretation except that which requires an affirmative response to the question certified. In two cases, *United States* v. *Stephenson*, and *Kinney* v. *Conant* (166 *Fed.* 720; 214 *U. S.* 526), subsequent to those named, the United States, by its Solicitor-General, has sought to bring the identical question again before this Court. Reconsideration was refused in each of these cases with the effect that a judgment against the United States and involving the affirmative decision of the present question was so far sanctioned by this Court as to become final and binding upon the parties.

Of the five cases in which judgments based upon an affirmative answer to the question certified have become final, two arose within the Seventh Circuit and, prior to the present certification, the Circuit Court of Appeals of that Circuit had twice decided that the tax was not collectible. (*United States* v. *Marion Trust Company, supra, and United States* v. *Stephenson, supra.*)

Section 6 of the act creating the Circuit Court of Appeals (26 Stat. 828) provides in part as follows:

> "That * * * in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

There is nothing in the statute which indicates that it was the purpose of Congress to place the docket of this Court at the mercy of the Circuit Courts of Appeals nor to place anywhere the power to compel the Supreme Court to reconsider questions upon which it has already passed and in contravention of its expressed purpose. To hold otherwise is to hold that the repeated refusal of this Court to reconsider a question already determined can be cir-

cumvented whenever a litigant can find a circuit court of appeals willing to aid him in imposing such a burden upon this tribunal.

> "In order, however, to invoke the exercise of our jurisdiction in the instruction of the Circuit Courts of Appeals as to the proper decision of questions or propositions of law arising in the classes of cases mentioned, it is necessary that such questions or propositions should be clearly and distinctly certified, and that the certificate should show that the instruction of this Court as to their proper decision is desired.
> * * * * * * *
>
> "We regard the certificate before us as essentially defective. It does not * * * state that instruction is desired for the proper decision of such question or questions.
> * * * * * * *
>
> "As in our judgment this certificate is not in compliance with the statute, we must decline to certify any opinion upon the matters involved, and direct the cause to be dismissed." (*Columbus Watch Company* v. *Robbins*, 148 *U. S.* 266, 269, 270.)

I–B. The Question Was Improperly Certified and Should Not Be Answered Because the Trial Court Was Bound by the Judgment of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Stephenson* (*Decided on May* 20, 1908, *not Reported; Certiorari Refused, October* 19, 1908, 212 *U. S.* 572) *and United States* v. *Marion Trust Company* (143 *Fed.* 301; *affirmed*, 203 *U. S.*

594, AND AS IT COMMITTED NO ERROR IN FOLLOWING THOSE CASES ITS JUDGMENT SHOULD HAVE BEEN AFFIRMED.

The Circuit Court of Appeals for the Seventh Circuit determined the question certified in the affirmative by its judgment, rendered on May 20, 1908, in the case of *United States* v. *Stephenson, supra.* This was a suit brought by the *United States* to recover legacy taxes claimed under the War Revenue Act of June 13, 1898 (30 *Stat.* 448), as amended by the Act of March 2, 1901 (31 *Stat.* 964), upon beneficial interests passing under the will of the late Daniel Wells, Jr., of Milwaukee, Wisconsin, who died testate on March 18, 1902, and presented the precise question now certified. Substantially the same question was determined in the same way by the same Court in *United States* v. *Marion Trust Company, supra.* Of course the trial court had no alternative, in the absence of a contrary conclusion by the higher authority of this Court, but was bound to follow these judgments and, having performed its duty in that respect, it was entitled to have its judgment affirmed, on appeal, by the appellate tribunal.

I–C. THE QUESTION WAS IMPROPERLY CERTIFIED AND SHOULD NOT BE ANSWERED BECAUSE THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAD DECIDED THIS QUESTION IN *United States* v. *Stephenson, supra*, AND *United States* v. *Marion Trust Company, supra*, AND WAS BOUND TO APPLY THE RULE *stare decisis* TO THIS CASE.

The Circuit Court of Appeals for the Seventh Circuit could not have required "instruction," on the question certified, "for its proper decision." Not only had it passed upon the question in the case of *United States* v. *Stephenson, supra*, but in *United States* v. *Marion Trust Company* (143 *Fed.* 301, *decided on January* 2, 1906), it had held that the tax on a distributive share was not "saved" by the saving clause of the repealing act of April 12, 1902 (32 *Stat.* 90), unless prior to July 1, 1902, the administration of the estate had so far proceeded that such share was "ready to pass, without diminution, to the heir." Circuit Judge Grosscup, delivering the unanimous opinion of the Circuit Court of Appeals in that case (Circuit Judges Baker and Seaman concurring) said in part:

> "The statute fails to identify without ambiguity, the thing to be taxed. We must go for light, therefore, to some of the collateral considerations. One of these, and in our judgment a determinative one, is that the tax provided for is *ad valorem* as distinguished from being specific, and that an *ad valorem* tax is imposed only by assessment—an assessment being prerequisite to the existence of the tax, 'the first step in the proceedings against individual subjects of taxation.' 1 *Cooley, Taxation* (3d *Ed.*), 597. But until the estate is ready to pass, without diminution, to the heir, no assessment can take place. Until the administration is in such condition that the heir is in a position to take, the thing to be taxed is not definitely knowable—the tax itself is not determinable." *United States* v. *Marion Trust Company*, 143 *Fed.* 301, 302.

It appears, therefore, that the Court from which the present question was certified had arrived at a conclusion which, it is submitted, it might well have followed instead

of seeking to impose an additional burden upon this Court. The most that can be said is that the situation is the same as that in *Columbus Watch Company* v. *Robbins*, *supra*, in which the Circuit Court of Appeals having no doubt of its own, was moved to certify a question on which it needed no instruction, causing this Court to say:

> "On the contrary, it appears therefrom that the Court had arrived at a conclusion, nothing doubting, * * * but that, because the Circuit Court of Appeals for another circuit had reached the opposite conclusion, under similar circumstances, the request for instruction is preferred.
>
> "While the fact that the Circuit Court of Appeals for one circuit has rendered a different judgment from that of the Circuit Court of Appeals for another, under the same conditions, might furnish ground for a certiorari on proper application, the assertion of the existence of such difference and of the wish that it might be determined by this Court is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. The difference can only exist when the courts have actually reached contradictory results, but each must proceed to its own judgment, unless such grave doubts arise as to induce the conviction that this Court should be resorted to for their solution in the manner provided for." *Columbus Watch Company* v. *Robbins* (148 *U. S.* 266, 269, 270).

It is true that since the determination of this question by the Circuit Court of Appeals for the Seventh Circuit in the two cases cited, the Circuit Court of Appeals for the Eighth Circuit in *Westhus* v. *Union Trust Company* (164 *Fed.* 795; 168 *Fed.* 617) has adopted a different conclusion, thus placing itself in opposition to the Circuit

Courts of Appeals for the First, Second, Third and Seventh circuits. But the *Westhus* case has not proceeded to final judgment. The decision of the Circuit Court of Appeals in that case was rendered upon an appeal by the Government from a decision overruling its demurrer and the case has been remanded for further proceedings which are now pending.

It was said by this Court, in *Columbus Watch Company* v. *Robbins, supra,* in one of the paragraphs that has already been quoted, that divergent conclusions in different Circuit Courts of Appeals "might furnish ground for a certiorari on proper application." But that no divergence exists, as to the question now certified, sufficient to constitute such ground, is certain, for since the decision in *Westhus* v. *Union Trust Company,* this Court has denied the writ of certiorari in *Kinney* v. *Conant, supra.* The *Westhus* case was decided on November 4, 1908, and certiorari was refused in the *Conant* case on May 24, 1909. The petition of the Solicitor-General for the writ of certiorari in the latter case (*October Term,* 1908, *No.* 852) particularly relied upon the decision in the *Westhus* case (*Petition, p.* 3) as establishing the conflict of decision on which this Court would grant the writ of certiorari. As there was not then sufficient ground for this Court to grant the writ of certiorari for the purpose of bringing up this question for its consideration, there was no ground for the refusal of the Circuit Courts of Appeals for the Seventh Circuit to apply its former conclusions to the case in which the present question arose.

I–D. The Question was Improperly Certified and Should not be Answered Because the Affirmance of the Judgments in *Eidman* v. *Tilghman*

(136 *Fed.* 141; 203 *U. S.* 580), *Philadelphia Trust, Safe Deposit & Insurance Company* v. *McCoach* (142 *Fed.* 120; 205 *U. S.* 539), *Norris* v. *McCoach* (142 *Fed.* 120; 205 *U. S.* 539) AND *United States* v. *Marion Trust Company, supra,* BY THE SUPREME COURT, THOUGH BY AN EQUALLY DIVIDED COURT, SETTLED THE PRINCIPLE OF LAW SO AS TO BIND EVERY TRIBUNAL INFERIOR TO THE SUPREME COURT.

Although this Court has affirmed five judgments (*Eidman* v. *Tilghman, supra; Philadelphia Trust Company* v. *McCoach—two cases—supra; Norris* v. *McCoach, supra;* and *United States* v. *Marion Trust Company, supra*) which depended upon determining the question now certified against the validity of the tax, it is true that the affirmance in each of these cases was by an equally divided court. Conceding, upon the authority of *Durant* v. *Essex Company* (7 *Wall.* 107), that a single affirmance, when this Court was equally divided, would not settle the law so as to constitute an authority in this Court, it is contended that such an affirmance binds every subordinate tribunal. It is the *judgments* of this Court which are binding upon subordinate tribunals and although those judgments are illuminated and explained when supported by written opinions, the latter are helpful in so far only as they are consistent with and necessary to the conclusion reached. When, as in the instances under discussion, the cases hinged upon a single and clearly defined question of law which is not susceptible of being overlooked or misunderstood, neither the absence of an opinion nor any consideration as to the number of justices who concurred in the conclusion can in any way affect the binding force of the judgment as to every tribunal except that in which it was rendered.

"While the fact that the decision was rendered by an equally divided vote of the Court of last resort may have left the law unsettled as far as that Court is concerned, it does not in any degree lessen the weight of authority that properly belongs to it as a precedent when the same matter is before an inferior Court." 26 *Amer. and Eng. Ency. Law, Second Edition, p.* 165.

Judge Cooley, the great jurist who so long distinguished the bench of the Supreme Court of Michigan, in an opinion in a case in which that Court divided equally with the result that his view as to the main question involved did not prevail, expressed clearly and forcibly the same view as to the effect of an affirmance by an equally divided Court. The following is from that opinion:

"When the case of the *Iron Cliffs Company* was decided, I assumed,—unwarrantably, it seems—that the judgment, though rendered by a divided court, would be accepted by the circuit judges as law and followed by this Court as a precedent, until it should be overruled by a majority of this Court. I have always supposed that was the proper course, and it seemed to me a course so necessary to a dignified and orderly administration of justice, that it never would have occurred to me that any other could be taken. Such a division of the Court is liable to occur at any time; and there are so many cases in which, by reason of interest, consanguinity or former connection with the controversy, some one judge is disqualified from sitting, that there would be constant liability to an equal division if the Court consisted of an unequal number. If, therefore, a decision made may be disregarded by a circuit judge because not made by a majority, we have and we can have no settled law for the State at large, and each circuit judge will determine for himself conclusively what shall be the law for his circuit, and may make it different from the law of the adjoining circuit. This would so

> much resemble a judicial scandal that I should deem it my duty to prevent it by yielding my own opinion when the same question should come up again, if yielding should be essential to prevent such a consequence. The notion that there can be anything improper or opposed to good morals in a judge yielding his opinion when a proper administration of justice requires it, is one I do not quite understand. Judges are certainly doing that every day: it would be a great mistake to assume that every judgment in which a Court unites, expressed in all respects the views of every concurring judge." *State Tax Law Cases*, 54 *Mich.* 417, 444.

The same conclusion was reached by the Supreme Court of South Carolina, in *City of Florence* v. *Berry*, decided on February 21, 1902, and although that case, as noted in the *Per Curiam* opinion of the Circuit Court of Appeals denying the petition for reargument in *Westhus* v. *Union Trust Company*, *supra*, arose under a provision of the Constitution of South Carolina providing, in terms, that when the appellate court divided equally the judgment of the lower court should be affirmed, it is plain that, in that respect, the constitutional provision added nothing to the universally accepted rule. The Court said, in part:

> "The sole question presented by this appeal is as to the effect of a judgment rendered by this Court, where the members thereof are equally divided and the judgment below is affirmed, under the provisions of the Constitution. Or, to state the question more specifically, whether such a judgment is of binding authority in any subsequent case presenting the same question, or whether it is only declarative of the law in the particular case in which such a judgment was rendered. In this case, his Honor, Judge Ernest Gary, held that he was bound by the judgment rendered in the previous case of *City of Florence* v. *Brown*, 49 *S. C.*, 330, by an equally divided court,

whereby, under the constitution, the judgment of his Honor, Judge Benet, was affirmed; and the practical inquiry in this case is whether Judge Gary erred in so holding.

"This is an important question, and is now presented for the first time for the decision of this Court. After full argument and careful consideration, this Court is entirely satisfied that the view taken by the Circuit Judge of this question is the correct view; though the writer of this opinion frankly confesses that the conclusion reached is contrary to his original impressions, which have, however, been entirely removed by mature consideration.

* * * * * * *

"* * * where a judgment is affirmed by a divided court, such a judgment must be regarded as a judgment of the Supreme Court, and as such is binding authority in all subsequent similar cases until it is overruled by competent authority." 62 *S. C.*, 469–470, 472.

Additional high authority for this conclusion is found in a note by the late Horace Binney Wallace, Esquire, of Philadelphia (brother of the late reporter of this Court), appended to the case of *Krebs* v. *The Carlisle Bank* (2 *Wallace, Jr.*, 49), and Justice Grier, in the course of the argument in the United States Supreme Court in *Durant* v. *Essex Company* (7 *Wallace*, 107, 109) interrupted counsel, and, referring to this note, said:

"That it was clear and satisfactory as to the effect of an affirmance of judgment by an equally divided court."

A part, only, will be quoted from this note, which is found in the *Appendix to* 7 *Wall., at page* 735, although to appreciate its full force it should be read and studied at length. Mr. Wallace said:

"Take it at the worst that is possible, and what is the nature and effect in law of a judgment affirmed from necessity in a Court of error, on an equal division of the Court? The history of the late case of *The Queen* v. *Millis*, will afford an illustration on this subject.

"This case, reported in *10th Clark & Finnelly's Appeal Cases*, 534, involved the question, whether a contract of marriage *per verba de præsenti*, but not made in the presence of a minister, in Episcopal orders, constituted a full and complete marriage at common law? On an indictment for bigamy, which depended upon this question, the Court of Queen's Bench in Ireland, four judges sitting, were equally divided; but afterwards, and for the purpose of obtaining the judgment of the House of Lords, one judge, who had been in favor of the validity of the marriage, in form withdrew his judgment, and thereupon a judgment of acquittal was entered, and the case was brought by certiorari to the House of Lords. In the House of Lords, Lords Abinger and Cottonham and the Lord Chancellor were of opinion that it was not a perfect marriage, and were for affirming the judgment; Lords Brougham, Denman and Campbell were of the opposite opinion. The entry on the journals of the Lords is: 'It is ordered and adjudged by the Lords that the judgment given in the said Court of Queen's Bench be, and the same is hereby affirmed; and that the record be remitted,' etc. And the fuller entry on the minutes states, that Lords Cottenham and Campbell having been appointed to tell the number of votes, it appeared, on report thereof, that the votes were equal, that is, two for reversing, and two for affirming, 'whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. Thereupon the judgment of the Court below was affirmed, and the record remitted.'

"While this case was pending in the Lords, the case of *Catherwood* v. *Caslon*, involving the same

general question, came on in the English Court of Exchequer (13 *Meeson & Welsby*, 261), and, after argument, judgment was suspended until the decision of that case. 'The case of *Regina* v. *Millis*,' says the reporter of the case in the Exchequer, 'having been determined, and the invalidity of a marriage at the common law, contracted *per verba de præsenti*, but not in the presence of a priest in holy orders, having been thereby established, the present case came on again for argument.' The counsel sustaining the side of the marriage admitted that, 'according to the decision of the House of Lords, it must be taken that no valid marriage had been contracted;' and Parke, B., in pronouncing the judgment of the Court said: 'The parties in this case entered into a contract of marriage *per verba de præsenti*, in the presence of witnesses, but not proved to have been made in the presence of a minister in Episcopal orders. Since the original argument, it has been decided in the House of Lords, in the case of *The Queen* v. *Millis*, that unless in the presence of such a minister, such a contract does not constitute a valid marriage at common law in this country; *and by the authority of that case we are bound*.'

"Undoubtedly, the affirmance of the judgment in *The Queen* v. *Millis*, was against what had been the general impression of the profession after the case of *Dalrymple* v. *Dalrymple*, yet no one in the Exchequer suggested that the affirmance in the House of Lords by an equally divided court had not settled the law by conclusive authority. An equal division of a Court of Error, on a question of reversing a judgment, is like a tie vote in a legislative assembly on a question of enacting or repealing a law. The binding nature of the decision is the same, as where the action of the body is unanimous. The influence of an opinion, on the minds of professional persons, will depend upon the character of the judge who delivers it, and on the number of judges who unite in it; but the authority of a judgment of a supreme tribunal, as establishing a principle and settling

> the law, is the same, whether the Court be full and unanimous, or partial and divided. A judgment affirmed by a divided Court binds inferior courts, and of course is a precedent in the Court in which it was entered."

Attention is also called to the opinion of Lord Chancellor Campbell in *Beamish* v. *Beamish* (9 *H. L. Cas.* 274; *s. c.* 5 *L. J.* 97) in which he held that the law was settled by the decision in *The Queen* v. *Millis, supra.*

> "But it is my duty to say that your Lordships are bound by this decision (*The Queen* v. *Millis*), as much as if it had been pronounced *nemine dissentiente* * * * The law laid down as your *ratio decidendi, being clearly binding on all inferior tribunals,* and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its separate authority * * * And the law may be laid down as established by *Regina* v. *Millis,* that a man and woman cannot be lawfully married except in the presence of a priest as a witness."

The foregoing conclusion by the Lord Chancellor was supported by the other individual opinions.

In the case of *Lessier* v. *Price* (12 *How.* 72) which involved the effect of a judgment by a divided court in the Supreme Court of Missouri, this Court said:

> "Our conclusion is, that the rulings of the Circuit Judge were adopted and affirmed by the judgment rendered in the Supreme Court, in like manner that they would have been had both judges concurred in affirming the judgment on all the grounds assumed by the Court below; to hold otherwise, would be declaring that nothing had been decided in the State Court of last resort, and thereby a second writ of error to this Court would be defeated."

The contrary conclusion was reached by the Circuit Court for the Eastern District of Pennsylvania in *Hanifen* v. *Armitage* (117 *Fed.* 845) and by the Circuit Court of Appeals for the Eighth Circuit in *Westhus* v. *Union Trust Company* (168 *Fed.* 617).

II–A. The Interpretation of the Act of June 13, 1898, Should now be Regarded as Settled Because in no Less than Seven Cases, with the Express Sanction of the Supreme Court, Citizens Similarly Situated in every Respect, have been Finally Relieved from the Payment of the Tax.

It has been conceded, upon the authority of *Durant* v. *Essex Company*, *supra*, that when this Court is equally divided in opinion, a single judgment, though necessarily the judgment of the Court, is not an authority on which subsequent litigants can here invoke the rule *stare decisis*. But with full recognition of this principle, what is to be said of a series of judgments, so rendered, which have permanently fixed the rights of certain parties so that another conclusion would constitue them an especially favored class? What if the deplorable consequence of departure from the earlier determinations would be the partial, unequal and unjust application of a special and temporary Federal taxing statute? Is there never a point at which the law must be taken as settled? The statement of these questions conveys their answer. By the affirmative action of this Court the estates affected by *Tilghman* v. *Eidman*, *supra*; *Philadelphia Trust Company* v. *McCoach*, (*two cases*), *supra*; *Norris* v. *McCoach*, *supra*, and *United States* v. *Marion Trust Company*, *supra*, have forever escaped the exaction of this tax. By the refusal of this Court to review judgments below, the estates

affected by *United States* v. *Stephenson*, *supra*, and *Kinney* v. *Conant*, *supra*, have forever escaped the exaction of this tax. These cases are *res adjudicata*. Certainly this Court will not now impose the tax upon an eighth estate whose situation differs from the first seven only in the fact that it has but a little less speedily applied here for justice.

II–B. THE INTERPRETATION OF THE ACT OF JUNE 13, 1898, SHOULD NOW BE REGARDED AS SETTLED BECAUSE A CONTRARY CONCLUSION WOULD MAKE THE TAX OPERATE UNEQUALLY AND CREATE GROSS INJUSTICE.

Numerous cases, in addition to those referred to under the heading last above, involving the question now presented, have been decided against the Government and applications for the writ of certiorari not having been made to this Court within the proper time, these judgments have become final. Among these cases are:—*Gill* v. *Austin* (157 *Fed.* 234), decided in the Circuit Court of Appeals for the First Circuit on November 21, 1907; *Lawrence* v. *Jordan* (*not reported*), decided in the Circuit Court of Appeals for the Second Circuit on February 13, 1907; *United States* v. *Rouss* (*not reported*), decided in the Circuit Court of Appeals for the Second Circuit on May 8, 1908, and *McCoach* v. *Bamberger* (161 *Fed.* 90), decided in the Circuit Court of Appeals for the Third Circuit on March 9, 1908. In the case of *Hunt* v. *Gill*, suit having been brought against the Collector of Internal Revenue for the Third District of Massachusetts in the Superior Court of the Commonwealth of Massachusetts, judgment was rendered against the Collector on June 7, 1909, and the judgment has become final.

These cases are now *res adjudicata*, the estates affected

have forever escaped the exaction of the tax. On the authority of these judgments and those cited under the preceding heading, many other estates have been distributed without the payment of the tax and without litigation and the property so distributed is no longer within the reach of the Collectors; these estates have forever escaped the exaction of the tax. On the other hand certain estates which paid the tax upon the demand of the Collectors and their representation that it was lawfully required but under protest, have filed claims in the Treasury Department for refunds in accordance with the statute in that case provided but have refrained from litigation in the confident expectation that the Government would eventually do them justice. They have never believed that the advantage of an especial exemption from taxation would accrue to those most litigiously disposed or that their own complacence would be penalized by subjecting them to the burden of an unequal tax. They have borne the hardship of the loss of the use of the funds so exacted, they have no expectation of obtaining interest for the time it has been withheld, but it is inconceivable that they should be compelled to lose their principal as well.

The bare presentation of the facts, it is respectfully submitted, leaves no alternative to the conclusion that justice requires adherence to the rule of interpretation previously sanctioned by this Court. That circumstances could arise under which a tax would be collected from A and not from B, though A and B were in precisely the same relation to the taxing power and in exactly the same condition as to liability, is, to an American, almost unthinkable. It is impossible that this Court should bring about that unjust result. Such would be the consequence of a negative answer to the question now certified.

> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." *Knowlton* v. *Moore*, 178 *U. S.* 41, 77, *and cases there cited.*

It is, therefore, most respectfully submitted that, whatever might have been the decision were the matter one of first impression, a radically different situation is now presented. Adherence to the rule of the former cases is now the only course consistent with justice.

III–A. IT IS CLEAR THAT CONGRESS INTENDED TO PREVENT THE COLLECTION OF ANY LEGACY TAX WHICH DID NOT BECOME DUE AND PAYABLE PRIOR TO JULY 1, 1902, BECAUSE THE CALCULATIONS AND STATEMENTS CONTAINED IN THE REPORT OF THE COMMITTEE ON WAYS AND MEANS OF THE HOUSE OF REPRESENTATIVES SHOW THAT REVENUE FROM THIS SOURCE WAS EXPECTED TO STOP ON THE DATE OF THE REPEAL.

Competent and persuasive evidence as to the intent of Congress embodied in the repealing act of April 12, 1902, is to be found in the report of the Committee on Ways and Means of the House of Representatives (*House Report No.* 320, *of February* 3, 1902, *entitled "Repeal of War-Revenue Taxation," Fifty-Seventh Congress, First Session*) which recommended its enactment.

That such evidence is competent—

The Delaware, 161 *U. S.* 459, 472;

Buttfield v. *Stranahan*, 192 *U. S.* 470, 495.

The purpose stated in the first sentence of the report was:

"To repeal all the various provisions of an Act entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' approved June 13, 1898, and of the act amendatory thereto, approved March 2, 1901, which impose any taxes (except upon mixed flour)."

On page 2 of the report it was further stated that for the fiscal year which ended with June 30, 1903, there would be "a total relief from war taxes on account of this bill amounting to $73,250,000."

Holding this sum of $73,250,000 in mind it is only necessary to discover from the report how it was made up in order to ascertain whether Congress intended to continue the collection of the legacy tax beyond July 1, 1902, the date of the repeal and the first day of the fiscal year in which citizens were to be relieved of this burden of war taxation. On this point the report is complete and definite and no task could be simpler. Page 4 shows, *inter alia*, the following receipts during the first half of the fiscal year 1902 under the internal revenue features of the War Revenue Act:

Item.	*Half-year's receipts.*
Schedule A	$6,925,145.27
Schedule B	324,527.59
Beer	14,343,317.40
Special taxes	4,226,229.41
Tobacco	4,908,734.71
Snuff	268,879.95
Cigars	344.99
Cigarettes	16,269.04
Legacies	2,634,963.74
Excise tax	493,682.42
Mixed flour	1,585.55
Additional taxes on tobacco and beer.	8,782.11
Total	$34,152,462.18

The Court is respectfully asked to note particularly the item "Legacies, $2,634,963.74," which is the fourth from the end of the foregoing table and, of course, a part of the "Total, $34,152,462.18." The Committee merely multiplied this total by two and, obtaining $68,304,924.36, substituted the round figure $69,000,000.00 and so assumed that amount as the "total of relief" to the people by cutting off these items on and after July 1, 1902.

> "As we have already seen, the receipts under the amended law for the first six months of the present fiscal year amount to $34,152,462.18, indicating for the full year $68,304,924.36. It is reasonable, therefore, to expect a gross revenue from the law as it stands to-day of about $69,000,000 from its internal revenue features for the present fiscal year."—*Report of Ways and Means Committee, page* 1.

It required another step to reach the aggregate estimate of relief of $73,250,000 and the nature and details of that step are extremely persuasive. There was to be an additional relief of $4,250,000 by means of the repeal of the tax on imports of tea. So, as to the twelve months from July 1, 1902, to June 30, 1903, the Committee said:

> "Adding this to the internal-revenue reduction of $69,000,000, we have a total relief from war taxes on account of this bill amounting to $73,250,000."—*Page* 2.

But, unlike the other taxes, the duty on tea was not to be stopped on July 1, 1902; its collection was to continue until January 1, 1903, that is, during the first six months of the fiscal year for which the relief of $73,250,000 was estimated. And as to the revenue from this source, the Committee said:

> "This year it will probably amount to $8,500,000. This bill repeals the duty on tea, the repeal to take effect January 1, 1903. We shall therefore receive the revenue from this duty for the first six months of the next fiscal year, and the reduction on this article will be only one-half of the annual revenue, or $4,250,000."—*Page 2.*

The tax on tea was singled out from the other war taxes for exceptional treatment in the postponement of the effective date of the repeal (the mixed flour tax was negligible as a source of revenue and, as such, was properly ignored in the calculations of the Committee) and the Committee thought that the reasons for this exception should be fully stated.

> "There were reasons which prompted the Committee to postpone the repeal of Section 50, imposing the duty on tea, to January 1, 1903, which seemed to them well founded."—*Report, page 2.*

And substantially four-fifths of page 2 is devoted to an explanation of this exception.

Now the contention of the Government in the present case is that the legacy tax was intended to be collected throughout the whole of the year that ended with June 30, 1903. Such a conclusion cannot be reconciled with the Committee's figures. Their plain and only consequence is the cessation of this source of revenue, with all others except tea, on July 1, 1902, the date the repealing act took effect. The Committee knew that $2,634,963.74 (*Report, page* 4) had been collected from this source in the first half of the fiscal year 1902; it estimated that amount as a part of the $69,000,000 (*Report, pages* 1 *and* 2) to be saved to citizens by relief from internal revenue taxation in the fiscal year 1903. If it had intended to

continue the legacy tax so as to provide that such taxes should become "due and payable," in spite of the repeal, and be collectible after the repeal, it would have deducted $5,269,927.48 from the aggregate of $69,000,000 and stated the relief from internal revenue taxes as $63,730,072.52 or thereabouts. And it would have estimated the total relief as $4,250,000 more than that sum or at approximately (perhaps using round figures) $67,980,072.52. *Ample allowance was made in the Committee's estimates for the six months' continuance of the tea tax, the reasons for its continuance were explained at length; yet counsel for the Government now contend that with no allowance in the estimates and no explanation in the report the legacy tax was continued for twelve months.*

"It is a wonderful condition," said the Committee:

> "It is a wonderful condition of our national finances which enables Congress to propose a reduction of $73,000,000 in the annual revenues. History furnishes no parallel to the situation. We had on the first day of the present month in the Treasury an available cash balance of $177,632,088.26, and this notwithstanding the fact the Treasury has paid out of this available surplus during the present fiscal year in the purchase of bonds for the sinking fund the sum of $61,196,444.56.
>
> "The Secretary of the Treasury in his annual report estimated the surplus of revenue over expenditures for the present fiscal year at $100,000,000. Subsequent events have confirmed this estimate as conservative and reasonable. With this surplus for the year, it would seem that notwithstanding this reduction of $73,000,000 we will still have a surplus of $27,000,000 for the next fiscal year.
>
> * * * * * * *
>
> "A surplus is a more healthy condition of affairs than a deficit, and no harm results from it so long as

there are outstanding bonds to be paid. There is no valid reason why we should continue to accumulate it, however. None of our outstanding bonds are now due. We can only purchase them in the open market. Our credit is so astonishingly good and our bonds in consequence bring so large a premium that it is difficult to purchase them in the market. Sound business judgment dictates a sweeping reduction of our revenues."—*Report, pages 2 and 3.*

So much has been given in order plainly to disclose the attitude of the Committee, the facts which controlled its action, the motives by which it was prompted and the arguments with which it appealed to Congress. Its arguments prevailed. Strange as, only seven years later, it may seem, the nation's Treasury was then over-supplied with cash; its revenues were redundant. The people had become restive under the prolonged imposition of war taxes in times of peace, when they served only to pile up a useless and demoralizing surplus. Congress had anxiously waited for its leaders to provide "a sweeping reduction" of taxation. And so the repealing act was drawn, was recommended, was passed. How strange the theory that, without explanation or comment, one of the most productive of war taxes, that on legacies, was singled out for continuance during another twelve months, a continuance so useless and so contrary to "sound business judgment." Had there been a reason for such continuance, as in the case of the duty on tea, it would have been set forth at length in the report and ample allowance made for it in the calculations. Not only was there no such allowance but it was made plain beyond peradventure that the whole of this source of revenue was to be cut off on July 1, 1902.

Times have changed. The once plethoric public purse is temporarily in a condition which suggests wholesome

frugality. Is it out of this condition that has sprung the amazing contention that a repeal which was expressly stated to take effect on July 1, 1902, had actually no practical operation until July 1, 1903? The remarkable claim that during twelve months after the date of repeal the tax was to be collected as though there had been no repeal can have no more justification in any such condition than it finds in the Committee's report. The tax was repealed because the revenue it produced was unnecessary and burdensome, a menace and an impediment to the prosperity of the country; the Act declared that the repeal should take effect on July 1, 1902; the Committee estimated that there would be no revenue from this source after July 1, 1902. These facts are conclusive.

III–B. It is Clear that Congress Intended to Prevent the Collection of any Legacy Tax Which Did not Become Due and Payable Prior to July 1, 1902, Because the "Saving Clause" in the Repealing Act Does not Disclose any Purpose to Continue this Tax.

The words of the repealing Act of April 12, 1902, were aptly chosen to accomplish their purpose. Section 29 of the War Revenue Act was in terms repealed to take effect on July 1, 1902, but as an unqualified repeal would have put an end to every pending proceeding for the collection of taxes lawfully assessed under that section the "saving clause" was added. Its purpose is plain, for in its absence every legatee or distributee whose responsibility had been concealed, who had been purposely or carelessly dilatory, or who had litigated upon trifling and untenable defenses would have gone free, to the unjust prejudice of all prompt and honest taxpayers. But the words of the

"saving clause" are significant of no purpose to extend the burden of this tax beyond July 1, 1902. They are:

> "That all taxes or duties imposed by Section twenty-nine of the Act of June 13, 1898, and amendments thereof, prior to the taking effect of this Act, shall be subject as to lien, charge, collection, and otherwise, to the provisions of Section thirty of said Act of June 13, 1898, and amendments thereof which are hereby continued in force, * * *."

So those taxes were saved, and those only, which were—

> "imposed * * * prior to the taking effect of this Act,"

"this Act," meaning the repealing Act that became effective on July 1, 1902.

When was the tax "imposed?"

The Government's present contention is that, *as to a certain class of interests*, the tax was "imposed" at and by the death of the testator or intestate. When it abandoned its original view which was, as will be hereinafter shown, that the tax was imposed when the legacy became payable, the Treasury Department adopted the theory that *in every case* the tax was imposed at and by the death. Such was the Government's contention in *Vanderbilt* v. *Eidman* (196 *U. S.* 480). But that view can no longer be urged. This Court, in *Vanderbilt* v. *Eidman*, *supra*, held that when an interest established under a will was a "contingent beneficial interest," not in a technical sense but within the intendment of that term as used in the refunding and declaratory Act of June 27, 1902, *the tax was not imposed at the death of the testator or at any time prior to actual possession or enjoyment by the legatee.* Mr. Justice White, delivering in that case the unanimous opinion of this Court, said:

> "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."—196 *U. S.* 480, 495.

So that the Government, in the present case, is driven to the necessity of contending that under the Act of June 13, 1898, there were two classes of interests as to one of which the tax was imposed at the death of the testator or intestate while, as to the other, imposition awaited the moment of actual possession or enjoyment as being the earliest at which the interests taxed had a "clear value" to the legatee. Such a contention would be strange and surprising in any event but it is especially so in view of the plain and explicit language of this Court in the case last above quoted.

> "It will be observed that the duties imposed in Section 29 have relation to two classes; * * * As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules. A consideration of the subsequent provisions of the section leaves no room for such a contention * * *" *Vanderbilt* v. *Eidman*, 196 *U. S.* 480, 491–4.

The two classes referred to in the foregoing extract were expressly designated in the taxing law, yet it was held that both must be governed by a single rule as to "liability for taxation" resting upon "actual possession or enjoyment." *The Government is now striving to support the claim that two classes exist where but one is designated in the statute and that each is to be governed by a separate rule.* Admitting, on the authority of the *Vanderbilt* case, as it must, that the imposition of the tax, that is the "liability for taxation" awaits, in one class of cases, "actual possession or enjoyment," the Government now argues that in another class the imposition is coincident with the death of the person from whom the property passes and may long antedate both possession and enjoyment. Indeed, if the Government's theory is valid there may often be taxation where neither "actual possession or enjoyment" is ever realized.

Nothing could be clearer than that Congress never intended that these taxes should be imposed at the death of the person from whom the legacy or distributive share passed. If Congress had understood or believed that there was no interval between death and the imposition of the tax there could have been no reason for the "proviso clause" expressly exempting estates of persons dying prior to June 13, 1898, which was added to Section 29 by the amendment of March 2, 1901. This proviso reads:

> "*And provided further*, That the provisions of this Act and of the Act hereby amended shall not be held to apply to any estate where the testator or intestate died before June 13, 1898."—31 *Stat.* 946.

It makes no difference whether this proviso is regarded as excepting something which would otherwise be within the terms of the taxing law or as guarding against a mis-

interpretation of the Congressional will. Whichever purpose must be assigned to this enactment it is perfectly plain that Congress could not have adopted it unless it had recognized an interval between the death and the imposition of the tax. The ordinary interpretation would doubtless regard it as excepting interests otherwise taxable. But if it is to have a narrower application the only conceivable misinterpretation against which it could have been deemed necessary is that of a construction to the effect that it was not essential that the death, as well as the possession by the legatee, should be subsequent to June 13, 1898.

The first sentence of Section 30, as amended on March 2, 1901, and as reenacted as a part of the saving clause of the repealing Act, reads:

> "That the tax or duty aforesaid shall be due and payable in one year after the death of the testator * * *."

As James F. Woodmen died on March 15, 1902, the Government must concede that no legacy tax became "due and payable" prior to the repeal of the War Revenue Act. Therefore no such tax was lawfully collectible, notwithstanding the "saving clause," unless it can be held that such tax was "imposed" *before* it became "due and payable." The tax in question was an *ad valorem* tax laid upon the receipt of legacies.

> "The thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate. * * *
>
> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, * * *.

"By elimination, the process of reasoning which we have resorted to in order to demonstrate the unsoundness of the first two contentions as to the meaning of the statute, renders it unnecessary to say anything in elaboration of the significance of the statute as embodied in the third proposition, which is, that the tax is on the legacies and distributive shares, the rate being primarily determined by the classifications and being progressively increased according to the amount of the legacies or shares. Its correctness is at once apparent when the other views are disposed of."—*Knowlton* v. *Moore*, 178 *U. S.* 41, 59, 60, 77, 78.

An *ad valorem* tax cannot be imposed except by assessment. This *ad valorem* tax was to be measured by a legacy and this required that the legacy itself should be measured before there could be a tax. It was to be measured by the "clear value" of the legacy, which precludes any suggestion that it was to be based upon an estimate of any sort. This is evident from a study of the relations of Sections 29 and 30 of the taxing statute. Section 29 prescribed and authorized the tax—it neither matured the tax nor provided means for its enforcement, these being left to Section 30. The inchoate rights of the Government under Section 29 were matured by Section 30, but when Section 29 was repealed there was nothing left on which the maturing processes of Section 30 could operate. Both sections were essential to impose the tax and when Section 29 was repealed no tax authorized by it which was not then fully matured and perfected could ever afterwards be matured and perfected. For the authority for the tax had been repealed.

It has been said that assessment is essential to the existence of an *ad valorem* tax; without assessment there is no such tax.

> "An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support and are nullities." *Cooley, Taxation, 3d Ed. Vol.* 1, *p.* 597. *See also People* v. *Weaver*, 100 *U. S.* 539.

An *ad valorem* tax upon a legacy obviously cannot be assessed until the amount of the legacy is ascertained. And until the time for presentation of claims against an estate has expired and the claims have been investigated it is not even known whether there is any legacy at all. The estate may be, and very often is, entirely consumed in the payment of debts and expenses of administration. Similarly, the legacy may increase by accumulation during the period of settlement. Probably the shortest time ever set for this preliminary labor of administration is one year from the death of the testator, and this is the usual period fixed by State statutes. The end of this period brings the earliest date on which the legacy can be demanded; often the period is much extended. Originally the Government conceded that the tax was not collectible until the estate was actually in shape for distribution.

> "Legacy tax is not payable until the legacy is payable, and the legacy must not be paid until the tax shall have been paid."—*Treasury Decisions, No.* 20591, *January* 19, 1899.

> "As the Missouri law allows two years for the settlement of an estate, it is not necessary for the administrator to make return on Form 419 until he is ready to make distribution and determine the value of the legacies or distributive shares to be paid. Payment of the tax before distribution is imperative

"Accumulations from dividends and interest in the hands of the executor or administrator must be included in making up the value, of personal property. They are not taxable until ready for distribution, and then they are taxable the same as the rest of the estate left by decedent. The clear value of the legacies is subject to tax."—*Treasury Decisions, No.* 21024, *April* 15, 1899.

The view expressed in the foregoing extracts was sanctioned by this Court in *Knowlton* v. *Moore, supra.*

"The provisions for the collection of this tax contained in Section 30 of the Act confirm the construction that the passing of each legacy or distributive share, and not the entire personal estate of a deceased person, forms the subject of the tax. Thus, before payment and distribution to the legatees, etc., an executor, administrator or trustee is required to pay 'the amount of the duty or tax assessed upon such legacy or distributive share,' and to 'make and render a schedule,' etc., in duplicate, 'of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon,' and the schedule is required to 'contain the names of each and every person entitled to any beneficial interest therein.'" 178 *U. S.* 41, 67, 68.

The foregoing precisely indicates the conclusion herein urged. That no other conclusion was possible is made plain by the mere recapitulation of the following terms used in the statutes to define the basis for the measurement of the tax.

"*ACTUAL VALUE,*"—*used in Section* 29 *with reference to the* $10,000.00 *exemption.*

"*CLEAR VALUE,*"—*used five times in Section* 29 *and twice in Section* 30 *to define the basis of the tax.*

"*ABSOLUTELY VESTED,*"—*used to qualify the term "possession or enjoyment," without which there was*

to be no tax, in the declaratory and refunding Act of June 27, 1902.

Surely, these modifying words, "actual," "clear," and "absolutely," each of which must be given full weight and effect, were not so put into the statutes without deliberate and definite purpose. And that purpose cannot be overlooked or mistaken. It was to confine the tax to those interests which had passed beyond the necessity of estimate and beyond the range of hazard. The interest which, by the establishment of unexpected claims against the estate, might be diminished below ten thousand dollars was not to be taxed until that possibility had been extinguished, until its "value" had become "*actual*" and "*clear.*" No interest was to be taxed until the time for the presentation and proving of claims had placed its "*clear value*" equally beyond question. And that the diminution, "to the extent of the tax," of the legacy or distributive share might be accurately and uniformly proportioned to the benefits received by the different legatees and distributees, the "clear" and "actual" value was to be ascertained coincidently with "possession or enjoyment" that had "*absolutely vested.*" Thus, as this Court said in *Vanderbilt* v. *Eidman, supra,*

> "The statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof." 196 *U. S.* 480, 493.

In the Act of June 13, 1898, and the amendments thereto, Congress, therefore, avoided the term "*fair market value,*" commonly found in taxing statutes and used in some State statutes providing for taxes upon legacies and distributive shares (for example in New York, see *Re Hoffman,* 143 *N. Y.* 327) and substituted, as the basis of the tax, the "clear" and "actual" value of interests "absolutely vested in possession or enjoyment." Thus Congress deliberately and wisely postponed the

"hard fact" of taxation until "chances and possibilities" should "develop into the truth of an actual estate." The moment for the imposition of the tax was made to coincide with the instant when "clear," "actual" and absolute value to the recipient, who must pay the tax, for the first time emerges from the doubts, uncertainties and chances which continue to the end of the period of administration.

A negative answer to the question certified requires, therefore, adherence to the view not only that the tax was "imposed" before it became "due and payable" but also before it was or could be assessed. That is to say, the words "imposed" being used in the taxing law in the sense of "laid on" it must be assumed that it was laid on before the thing on which it was laid had come into existence. Interpreting an earlier statute of the same sort this Court said:—

> "The return for assessment and the actual payment of the tax, therefore, are made by law so nearly simultaneous as that the one follows the other in immediate succession, and it cannot well be said, upon the terms of the Act, that the right to the tax has become vested until the obligation arises to list the property for taxation." *Mason* v. *Sargent*, 104 *U. S.* 689.

But the precise question now submitted to the Court was decided in *Mason* v. *Sargent*, *supra*, and upon its decision rested the determination of that case. In that case, the plaintiff's testator, William P. Mason, died on December 4, 1867, while the Federal inheritance tax law of 1864, repealed on October 1, 1870, was in force. The plaintiff's legacy, which the Court found had been illegally taxed, was payable after the death of the testator's widow, who died on June 17, 1872, after the repeal of the taxing law. The

Court held that the plaintiff's legacy had been unlawfully taxed *for the reason* that *the tax had not become due and payable until after the repeal.* The decision does not rest in any degree upon any suggestion as to the nature of the interest on which the tax was collected, but is based squarely upon the following:

> **"No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses."**

That a negative answer to the question now certified cannot be given *without overruling the foregoing,* which must have been in the mind of Congress in the enactment of the Act of June 13, 1898, and the amendments thereto, including the amendment of March 2, 1901, which made the tax "due and payable" *one year after the death of the testator,* is respectfully submitted.

Congress used the word "imposed" in the saving clause of the repealing act in a sense indicative of an act performed by the Executive. This must be the case for it was unmistakably used in that sense in the refunding amendment, approved on June 27, 1902, to the War Revenue law, which was passed a few weeks later in the same session and as there is no textual indication of variant meaning.

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law * * * and if it can be gathered from a subsequent statute *in pari materia,* what meaning the Legislature attached to the words of a former statute, they will amount to a legislative

declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 *How.* 556, 564, 565. *See also Reiche* v. *Smythe*, 13 *Wall.* 162, 165.

"If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended." *Lewis' Sutherland, Statutory Construction, 2 ed., Vol. 2, p.* 684.

"'Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are *in pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times.' Acts *in pari materia* should be construed together and so as to harmonize and give effect to their various provisions. *This is especially the case when the acts are passed at the same session.*" *Ibid*, 845, 846.

"It is to be presumed that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy and they should be construed each in the light of the other." *Houston & Texas Central Railway* v. *State*, 95 *Texas*, 507, 523; 62 *S. W.* 114.

The repealing Act of April 12, 1902, and the refunding Act of June 17, 1902, were passed at the same session, they were both amendments to the War Revenue Act of June 13, 1898, they were probably drawn by the same hand, they are certainly *in pari materia*, they were undoubtedly actuated by the same policy. Therefore the word "imposed" in one means what it means in the other. The refunding Act says, in part:

"* * * and *no tax shall hereafter be assessed or imposed* under said Act approved June 13, 1898, upon

> or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

Congress forbids or authorizes the Executive, occasionally the Judiciary; it does not forbid or authorize itself. The limits upon its power and the scope of its authority are laid down in the Constitution; it cannot have committed the absurdity of attempting to forbid the future imposition of a tax by itself. So the word "imposed" clearly refers to the Act of the Executive, an Act coincident with assessment or at least not possible to be performed earlier than the date on which the tax became "due and payable." For until that date the Executive had no duty with relation to the particular legacy to perform. The earliest date, then, on which the tax could be "imposed" within the meaning of the saving clause was that on which it became due and payable and if this date was not prior to July 1, 1902, the tax was neither "imposed" nor "saved." This was the view of both the Circuit Court and the Circuit Court of Appeals in *Eidman* v. *Tilghman, supra.* Judge Lacombe in that case said:

> "I am unable to distinguish this case from Mason *v.* Sargent, 104 U. S. 689. Under the statute and amendments and the principle enunciated in that case, no tax was due or payable, nor was there a lien for any tax upon the property of the deceased, at the time the repealing Act of April 12, 1902, went into effect (July 1, 1902). Under these circumstances it cannot be said that any tax was *imposed* within the meaning of the saving clause, Section 8 of the Act last cited." 131 *Fed.* 652.

And on appeal Judge Wallace said:

"Section 30 does not in terms fix the time of the commencement of the lien, but its provisions do not necessarily import the existence of a lien prior to the time when it becomes the duty of an executor to pay the tax and render the list to the collector. We are of the opinion that this is the time when the lien first attaches, and consequently when the tax is *imposed;* and, however we might regard it as an original question, we are constrained to this conclusion by the decision in *Mason* v. *Sargent,* 104 *U. S.* 689."—136 *Fed.* 143.

So in *United States* v. *Marion Trust Company, supra,* the Circuit Court of Appeals for the Seventh Circuit said:

"The statute fails to identify without ambiguity, the thing to be taxed. We must go for light, therefore, to some of the collateral considerations. One of these, and in our judgment a determinative one, is that the tax provided for is *ad valorem* as distinguished from being specific, and that an *ad valorem* tax is imposed only by assessment—an assessment being prerequisite to the existence of the tax, 'the first step in the proceedings against individual subjects of taxation' (1 *Cooley, Taxation, 3d Ed.* 597). But until the estate is ready to pass, without diminution, to the heir, no assessment can take place. Until the administration is in such condition that the heir is in a position to take, the thing to be taxed is not definitely knowable—the tax itself is not determinable. True, an estate likely to eventuate in distribution, becomes prospectively the subject of taxation under the War Revenue Act. But obviously it is not on a mere prospect, a thing coming, that the duty was intended to be laid. Obviously the duty was intended to be laid on a thing already at hand—on a thing that can be measured, and in that way assessed. And this leads to the conclusion that at the time the War Revenue Act was repealed, no tax had been imposed upon the distributive share under consideration."—143 *Fed.* 302.

Such, too, was the conclusion under the earlier War Revenue law.

> "No tax was *imposed* until the beneficiaries under the will, or intestate laws, came to the possession or enjoyment of their property."—*United States* v. *Hazard*, 8 *Fed.* 380.

Construing the provisions of Section 125 of the War Revenue Act of 1864, as amended in 1866, Mr. Justice Matthews, speaking for the Court, declared that the tax becomes a lien only from the time when it accrues—

> "for the lien presupposes the existence of the tax."—*Mason* v. *Sargent*, 104 *U. S.* 689, 693,

and his remark is equally in point as to the amendment of 1901 to Section 30 of the Act of 1898, as will be perceived by comparing its language with that of the statutes before him for consideration. And this Court's ruling that the tax was not even a lien until it became due and payable, a ruling reaffirmed in *Sturges* v. *United States*, 117 *U. S.* 363 (*reversing* 15 *Blatchf.*, 13) must be regarded as adopted and given statutory force by Congress when it substantially reenacted the old law (*See Knowlton* v. *Moore*, 178 *U. S.* 41, 76; *Vanderbilt* v. *Eidman*, 196 *U. S.* 480, 499, 501).

As to the tax on successions to real property under the old law, this Court said:

> "It is manifest that the right does not accrue until the duty can be demanded, that is, when it is made payable, * * *"—*Clapp* v. *Mason*, 94 *U. S.* 589.

There are few cases in which so great a weight of authority has accumulated in favor of the precise point contended for by either party as in this instance is found to support the affirmative of the question certified. An ordinarily

litigious party will usually stop before obtaining so many adverse decisions. As certain cases have not been reported, it has not been practicable to compile a complete list but the following judges, sitting in the various Circuit Courts and Circuit Courts of Appeals, have held adversely to the contention now urged by the Government.

Hon. Marcus W. Acheson, Circuit Judge:
Philadelphia Trust Company *v.* McCoach; Norris *v.* McCoach.
Hon. Edgar Aldrich, District Judge:
Gill *v.* Austin.
Hon. Francis E. Baker, Circuit Judge:
United States *v.* Stephenson; United States *v.* Marion Trust Company.
Hon. Arthur L. Brown, District Judge:
Kinney *v.* Conant.
Hon. Joseph Buffington, District Judge:
McCoach *v.* Bamberger.
Hon. Le Baron B. Colt, Circuit Judge:
Kinney *v.* Conant; Sanders *v.* Rumsey.
Hon. Alfred C. Coxe, Circuit Judge:
Eidman *v.* Tilghman.
Hon. George M. Dallas, Circuit Judge:
Philadelphia Trust Company *v.* McCoach; Norris *v.* McCoach; McCoach *v.* Bamberger.
Hon. David P. Dyer, District Judge:
Westhus *v.* Union Trust Company.
Hon. George Gray, Circuit Judge:
Philadelphia Trust Company *v.* McCoach; Norris *v.* McCoach; McCoach *v.* Bamberger.
Hon. Peter S. Grosscup, Circuit Judge:
United States *v.* Stephenson; United States *v.* Marion Trust Company.
Hon. Henry L. Lacombe, Circuit Judge:
Eidman *v.* Tilghman; Sanders *v.* Rumsey.
Hon. Francis C. Lowell, Circuit Judge:
Kinney *v.* Conant.
Hon. John B. McPherson, District Judge:

Philadelphia Trust Company *v.* McCoach; Norris *v.* McCoach.
Hon. Walter C. Noyes, Circuit Judge:
Sanders *v.* Rumsey.
Hon. William L. Putnam, Circuit Judge:
Gill *v.* Austin.
Hon. William H. Seaman, Circuit Judge:
United States *v.* Stephenson; United States *v.* Marion Trust Company.
Hon. William K. Townsend, Circuit Judge:
Eidman *v.* Tilghman.
Hon. Jacob Trieber, Circuit Judge:
Farrel *v.* United States.
Hon. William J. Wallace, Circuit Judge:
Eidman *v.* Tilghman.

The foregoing does not include the unreported decisions against the Government in the circuit courts in *United States* v. *Stephenson*, *Gill* v. *Austin*, *United States* v. *Marion Trust Company*, *Sanders* v. *Rumsey*, *McCoach* v. *Bamberger*, *Lawrence* v. *Jordan* or *United States* v. *Rouss*. The following judges, in a single case (thereby reversing the trial court), have approved the Government's present contention.

Hon. Almer B. Adams, Circuit Judge:
Westhus *v.* Union Trust Company.
Hon. John E. Carland, District Judge:
Westhus *v.* Union Trust Company.
Hon. William C. Hook, Circuit Judge:
Westhus *v.* Union Trust Company.

III–C. It is Clear that Congress Intended to Prevent the Collection of any Legacy Tax which Did Not Become Due and Payable Prior to July 1, 1902, Because the Period of one Year Between the Death of the Testator and the Date on which the Statute Made the Tax "Due and Payable" Coincides with the Period Ordinarily Allowed for Presenting and Proving Claims Against the Estate, and Until that Period has Elapsed and the Net Value of the Estate has been Ascertained the Interests of Legatees and Distributees are "Contingent Beneficial Interests" which Cannot "Become Absolutely Vested in Possession or Enjoyment" within the Meaning of the Refunding and Declaratory Act of June 27, 1902.

The Act of June 27, 1902, was in part a declaratory statute. This conclusion has already been announced by this Court:

> "In view of the provision for refunding we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the Act of 1898, * * *" *Vanderbilt* v. *Eidman*, 196 *U. S.* 480, 500.

The words "contingent beneficial interest" used in this Act were not used in a narrow or technical sense, but were intended to relieve the legatee or distributee from any burden on account of the tax until such time as the legacy or distributive share should come into his actual physical possession. This was not only reasonable and just, in view of the fact that the tax must be deducted from the legacy, but was also necessary in order that there should be opportunity for a fair and proper assessment based on "clear value."

"It will be observed that the duties imposed in Section 29 have relation to two classes; * * * As to this second class, *the statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof.* By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules. A consideration of the subsequent provisions of the section leaves no room for such a contention, * * * and * * * it is specifically provided that a tax is to be levied in respect only of a beneficial interest having a clear value."—*Vanderbilt* v. *Eidman*, 196 *U. S.* 480, 491, 494; 49 *L. Ed.*, 563, 567.

"Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, *conditioned on his attaining the ages of thirty and thirty-five years*, respectively, it is unnecessary to determine whether such interest was technically a vested remainder * * *"—*Vanderbilt* v. *Eidman*, 196 *U. S.* 480, 501; 49 *L. Ed.*, 563, 571.

Applying the foregoing to the case in hand, it is evident that in the sense in which the term "contingent beneficial interest" was used in the refunding statute and therefore in the sense in which it is to be read into the original statute, the interests established by the will of James F. Woodman were "contingent" and did not come into the possession or enjoyment of the beneficiaries prior to July 1, 1902. Mr. Woodman died (*Certificate, page 2*) on March 15, 1902, his will was admitted to probate on May 3, 1902, and the demand of the Collector for the tax was made on January 17, 1905.

"As the Act applies only to 'contingent beneficial interests which shall not have become vested prior to July 1, 1902,' it is important to determine whether the distributive shares of these plaintiffs, as sole heirs of their mother, who died intestate in the State of Arkansas, * * * were contingent interests which did not become vested prior to July 1, 1902. * * *

"The intestate died June 3, 1901, and the administrator of the estate was appointed July 23, 1901. The two years within which creditors could exhibit their claims expired on July 23, 1903.

"In Refeld *v.* Bellette, 14 Ark. 148, it was held that under these statutes the estate of a testator passes, upon his death, into the hands of his executor, in the first place to pay debts, and the right of a legatee to his legacy is suspended until the assent of the executor or the lapse of time for the settlement of his estate, as the devisee takes the legacy subject to the payment of the debts. * * *

"Therefore, until the estate is ready for distribution, which cannot be done under the laws of this State until the expiration of two years from the date the letters of administration were granted and the presentation and allowance of claims barred by the statute of non-claims, there can be properly no assessment of the tax, as it is impossible to determine how much, if anything, will go to the heirs. * * *

"From what has been stated hereinbefore, it is clear that, until the time within which claims against the estate of a deceased person may be presented has expired, the interests of the heirs or devisees are purely contingent, and they are neither entitled to the possession or enjoyment of any part of the estate, and, in fact, may never receive anything from the estate, for the debts proved against it within the time allowed by statute may consume all the personalty of the estate. It may, and has frequently happened, that a person dies leaving an estate which inventories hundreds of thousands of dollars in personalty, and yet upon final settlement after the payment of debts

and assignment of dower, when there is a widow, may leave nothing for distribution among the heirs or devisees, and may even prove insufficient to pay all the debts in full. Would, in such a case, the tax accrue on the supposed value of the estate upon the contingency that upon final settlement the heirs may receive the estate as inventoried, less the debts probated at the time of the assessment of the tax, although there is another year within which debts may be probated?"—*Farrell* v. *United States* (*District Court, E. D. Arkansas, W. D.*, 167 *Fed.* 639, 641, 642, 643).

III–D. It is Clear that Congress Intended to Prevent the Collection of any Legacy Tax which Did Not Become Due and Payable Prior to July 1, 1902, Because the Terms Necessary to Express a Different Intent were Well Understood and Congress would have Used Them and Every Doubt or Ambiguity in the Act of June 13, 1898, and Amendatory Acts Must be Construed in Favor of the Citizen.

The power of taxation is one of the attributes of sovereignty which most materially modifies the property rights of the citizen. Essential, as it is, to the existence of Government, its necessary mode of exercise so far deprives those from whom taxes are demanded of the safeguards commonly provided against unjust exactions on the part of authority that the intention to tax any subject can never be implied and the expression of the sovereign will to tax must always be set forth with completeness and precision. This doctrine has already been applied by the Supreme Court to the interpretation of the War Revenue Act:

"It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty though the rule regarding *exemptions* from general laws imposing taxes may be different.

"We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."—*Eidman* v. *Martinez*, 184 *U. S.* 578, 583; 46 *L. Ed.*, 697, 701.

The principle was also applied by the Circuit Court of Appeals for the Second Circuit in *Eidman* v. *Tilghman*, *supra*, the Court saying in part:

"a tax is never to be exacted from a citizen by a doubtful interpretation of a taxing act."—136 *Fed.* 143.

Similarly in *Disston* v. *McClain*, Judge Gray, also construing the Spanish War Revenue Act of June 13, 1898, and speaking for the Circuit Court of Appeals for the Third Circuit, said:

"In this case, as in all cases involving questions of taxation, it must be borne in mind, as a canon of construction of universal acceptance in American and English jurisprudence, that no tax burden is held to be laid on citizen or subject, unless the legislative intention to so impose it is expressed in clear and unequivocal language, and that in cases of doubt, statutes imposing taxes are construed most strongly against the Government and in favor of citizens or subjects, and that such statutes are not to be liberally construed."—147 *Fed.* 114, 116, 117.

In a still later case, *Lynch* v. *Union Trust Company*, another arising under the Act of June 13, 1898, the Circuit Court of Appeals for the Ninth Circuit said, in part:

> "Primarily in this connection it is necessary to keep in view a cardinal principle, to be applied generally to the interpretation of legislation whereby the Government seeks to impose a duty or burden upon the property or rights of the citizen in the nature of taxation, and more especially applicable to statutes such as this, seeking to impose a burden of a special or unusual character, and that is that, in all cases of doubt or ambiguity arising on the terms of such a statute, every intendment is to be indulged against the taxing power."—164 *Fed.* 161, 163.

The reason for this rule of construction is plain and is admirably stated by Judge Cooley:

> "* * * it is fairly and justly presumable that the legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced."—*Cooley on Taxation, 2d ed., p.* 464.

Observations Suggested by Brief for Plaintiff in Error.

I.

The learned Solicitor-General explicitly and frankly abandons the position hitherto maintained by the Government in the long series of cases to which this one belongs. That is to say, he definitely disavows the proposition that any tax under the Act of June 13, 1898, was imposed at the death of the person from whom the property passed

and substitutes therefor the contention that imposition occurred at the moment of possession and enjoyment on the part of the legatee.

> "What then was the true and only source of the duty of the executors or administrators to make assessment and payment? It could have been only the vesting of the legacy or distributive share in possession and enjoyment. No other event after that and 'before' delivery of the legacy or share to its beneficiary can possibly have fixed the duty."—*Brief for Plaintiff in Error, p. 43.*

Thus the Solicitor-General recognizes the existence of an interval between the death and the imposition and, as this Court will take notice of the fact that one year is usually the shortest period allowed for the presentation and proving of claims against the estate and that prior to its expiration the legatee or distributee cannot demand his legacy or share, he admits, in effect, that only in rare instances can that interval be less than one year. The certificate in the present case strongly suggests, if it does not show, that the interval conceded by the Solicitor-General was, with reference to the estate of James F. Woodman, much greater than one year, for it appears that although the testator died on March 15, 1902, the date of January 17, 1905 arrived "before the payment and distribution to the legatees."—*Certificate, p. 2.* Prior to January, 1905, there was, therefore, no "possession and enjoyment" on the part of the legatees and hence, if the theory of the Solicitor-General is sound, there was, until that time, nothing on which the tax could be imposed in accordance with the terms of the statute even had there been no repeal. The personality of the testator was in the possession of the executors, the defendants in error.

"The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels, as was the testator himself while alive."—*Griffith* v. *Frazier*, 8 *Cranch*, 9, 24.

"But on the death of the administratrix the complainant remained the sole surviving administrator, and in him was vested the exclusive title and the right to the immediate possession of the assets of the estate of the deceased minor."—*Harrison* v. *Perea*, 168 *U. S.* 311, 321.

And in the State of Illinois, where the decedent Woodman, had his domicile, the statutory period of administration, as fixed at the time of his decease, was two years.—*Hurd's Revised Statutes of Illinois* (1901), *Chapter* 3, *Section* 70, *page* 116. Therefore the full acceptance, by this Court, of the propositions advanced by the Solicitor-General could lead to but one conclusion and that conclusion is that the Circuit Court of Appeals for the Seventh Circuit has, in this case, improvidently certified a question which could not possibly control the decision of the case in which it has arisen. We submit that the Circuit Court of Appeals has made no such error.

Defendants in error do not contend that in no case was the imposition of the legacy tax *postponed more than one year* from the death of the testator. But they do urge, that, whatever limitations may attend the application of the clause making the tax due and payable one year after the death of the testator in cases in which the period of administration was more prolonged, Congress recognized the ordinary statutory restriction as to the payment of legacies and, in view of the impossibility of a fair and

uniform adjustment of the tax to the ascertained "clear" and "actual" value at an earlier date, provided that the tax should never be imposed until at least twelve months after the testator's death. In so doing it established a fair, reasonable and uniform rule. Whether that rule was universal in its application, or must, of necessity, yield where enjoyment and possession were unusually deferred, is a question not now before the Court. Nor is the Court now under any necessity to determine what the rule may be as to the estates of intestates.

II.

Section 29, a part of the taxing Act of June 13, 1898, is not greater than the whole Act, nor stronger. In repealing Section 29 Congress re-enacted the whole of Section 30, including its first sentence, which made the tax:

> "due and payable one year after the death of the testator"

and, although the saving clause refers to "taxes or duties imposed by Section 29," it also makes every tax to which it refers—

> "subject, as to *lien, charge collection, and otherwise* to the provisions of Section 30,"

which was re-enacted. And at every step in the legislative history of the inheritance tax law of 1898 Congress must be presumed to have been fully cognizant of and guided by the interpretation placed by this Court on the prior inheritance law of 1864. When Congress repealed the inheritance tax law of 1898 it well knew that it had been decided, under the law of 1864, that no tax not "due and payable" prior to the repeal could thereafter be collected—*Mason* v. *Sargent, supra.*

III.

The Solicitor-General appears to have misapprehended the point upon which turned the decision in *Mason* v. *Sargent, supra*. As already noted herein the determination of that case was placed by the Court squarely upon the fact that there was no right under the statute to demand the payment of the tax prior to the date of the repeal. It is true that the interest on which the tax was declared to have been unlawfully collected, was postponed until the falling in of a previous life interest, but there is no intimation, in the unanimous opinion of the Court, that this fact had anything to do with its decision, much less that there could have been any other conclusion had the right to demand payment been postponed in any other way.

The same comment must be made upon the effort of the Solicitor-General to draw conclusions favorable to his contention from the prior case of *Clapp* v. *Mason, supra*, arising in connection with the same estate. In *Clapp* v. *Mason*, this Court, speaking through Mr. Justice Hunt, noted that the tax then in question was applicable not only to vested estates but to estates in expectancy, saying:

> "The argument made upon this section by the plaintiff in error, that the will of Mr. Mason conveyed an estate to William P. Mason and Charles H. Parker, and that, although they were not entitled to immediate possession, they had a vested estate, and that the succession to such an estate was made taxable, we readily admit. We agree, further, that vested estates not only, but estates which are not vested, those in expectancy merely, are within the statute".

So that there was in that case no question as to the application of the taxing law had it remained unrepealed, but only as to whether, the law having been repealed before the time of payment arrived, the tax could thereafter be collected, and upon this point the Court decided:

> "It is manifest that the right does not accrue until the duty can be demanded, that is, when it is made payable; * * *"—*Clapp* v. *Mason*, 94 *U. S.* 589.

Equally pertinent and decisive is the concluding sentence of the opinion by Mr. Justice Matthews in *Mason* v. *Sargent*, *supra*, and although it has been hereinbefore quoted, it will be repeated.

> "No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses."

IV.

The Government seeks some advantage in the legislative history of the repealing Act of April 12, 1902. It is true that this act, as it originally passed the House of Representatives, was somewhat inartistically drawn and of this the brief of the Solicitor-General affords evidence which is neither pertinent to the question now in hand nor necessary here to repeat. The purpose of Congress, growing out the redundant condition of the public treasury and the public protest against the continuance of war taxes in time of peace, was plainly indicated in the report of the Committee on Ways and Means in recommending the repeal to Congress, and it is sufficient to note that the measure was perfected, so as to accomplish that

purpose, before the final enactment. If any inference is to be drawn from the striking out, before passage, of the language which, had it remained, might have seemed to have the effect of saving the tax as to the estates of persons dying between July 1, 1901, and July 1, 1902, it must be that it was realized that this language would defeat the purpose of Congress. That purpose, as clearly shown by the elaborate calculations of the Committee, already cited herein, which make no allowance for any revenue from legacy taxes after July 1, 1902, was to cut off this source of revenue at once upon the repeal of the Act.

V.

Under the necessity of admitting, in accordance with *Eidman* v. *Martinez, supra,* that this particular taxing statute is not to be construed so as to sustain a tax, the right to which is not expressed in "clear and unambiguous language," the Solicitor-General suggests that "the situation is reversed" as to the saving clause and that as to the latter, the Government is entitled to a liberal construction in its own favor. It is submitted that this conclusion is consistent neither with the reason of the rule applied in *Eidman* v. *Martinez, supra,* nor with the ordinary rule of statutory construction.

> "The same reasons which exist for a strict construction of a proviso apply to a saving clause where there is an express repeal and the saving clause is intended to restrict it. The special intent in the saving clause prevails over the general intent in the repeal; but the repugnance will be reduced to a minimum in civil cases by construction of the former."—*Lewis' Sutherland Statutory Construction, Second Edition, Volume II, pp.* 678–679.

The saving clause is, in effect, a part of the taxing statute. It is, in fact, all of that statute which is left in force and applicable. Hence it is manifest that the citizen from whom a tax is demanded, after the repeal and upon the ground that it has been "saved," is entitled to find in the taxing law, as it then stands, the purpose of the legislature plainly and unambiguously expressed. Certainly this Court cannot hold that the repeal of the taxing statute deprives him of that essential right.

Conclusion.

It has been shown (*a*) that the Circuit Court of Appeals for the Seventh Circuit has already twice decided adversely to the Government upon the question now certified; (*b*) that this Court has affirmed judgments in five cases in which the same question was decided adversely to the Government; (*c*) that this Court has repeatedly refused to review other decisions in which it was determined adversely to the Government; (*d*) that the Circuit Courts of Appeals for the First, Second, Third and Seventh Circuits have determined the question adversely to the Government; (*e*) that in recommending the repeal to the House of Representatives the Committee charged with the duty of devising ways and means for meeting Government expenditures submitted calculations which show that it intended that no taxes should be collected from this source after the date of the repeal; (*f*) that in repeated amendments to the law Congress treated the tax as accruing only when the legacies or distributive shares were ready for payment to the legatees or distributees; (*g*) that until such time it was impossible to ascertain the "clear value" of the thing taxed; (*h*) that in the latest

legislative act upon the subject Congress forbade the collection of the tax upon interests in any way contingent and commanded the return of such taxes previously collected.

With great respect we suggest that, in view of the foregoing, the question should be disposed of either—

A. By declining to certify an answer to the Circuit Court of Appeals, leaving that Court to follow its own original and correct determination of the question, or—

B. By answering the question certified in the affirmative.

All of which is respectfully submitted,

UNDERWOOD & SMYSER,
EDWARD LAUTERBACH,
H. T. NEWCOMB,
For the Defendants in Error.

APPENDIX.

THE STATUTES.

The acts and parts of acts to be considered in this proceeding are as follows:

EXTRACTS FROM WAR REVENUE ACT.

Section 29. "That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: * * * the tax shall be— * * * at the rate of * * * for each and every $100 of the clear value of such interest in such property * * *" (*Act of June* 13, 1898, 30 *Stat.* 448, *as amended by Act of March* 2, 1901, 31 *Stat.* 946.)

Section 29. "* * * provided further, That the provisions of this Act and of the Act hereby amended shall not be held to apply to any estate where the testator or interstate died before June thirteenth, eighteen hundred and ninety-eight."—*Proviso added to Act of June* 13, 1898, *by amendment of March* 2, 1901 (31 *Stat.* 946).

Section 30. "That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of non-residents, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together wih the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter pro-

vided."—Act of June 13, 1898 (30 *Stat.* 448) as amended by the Act of March 2, 1901 (31 *Stat.* 946) and as reenacted by the repealing Act of April 12, 1902 (32 *Stat.* 97).

EXTRACT FROM REFUNDING AND DECLARATORY ACT.

Section 3. "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two." (*Act of June 27, 1902, 32 Stat.* 406.)

EXTRACTS FROM REPEALING ACT.

Section 7. "That section * * * twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed.

Section 8. "That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows:

* * * * * * *

Section 11. "That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two." (*Act of* April 12, 1902, 32 *Stat.* 97, 98, 99.)